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No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

RAYMOND F. LEDERER,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Did the Executive's creating a scenario compatible with the activities of an honest and effective Congressman for the purpose of luring Members of Congress into a criminal act, despite the absence of any reason to suspect them of ongoing corruption or abuse of office, violate the principles underlying the constitutional doctrine of the "separation of powers" and the Speech or Debate Clause of the Constitution?

2. Did the government's conduct in the ABSCAM operation and prosecutions, including its failure to supervise and to control its informant and middlemen, initiation and participation in crimes, temptation of public officials without any reasonable basis for believing they were corruptible and failure to correct inadequacies and questionable techniques when confronted with them, reach the level of outrageousness and governmental overreaching violating due process standards?

3. Did the prosecution's evidentiary use of a financial report filed by petitioner in the House of Representatives in the course of his official duties as a Congressman violate the Speech or Debate Clause of the Constitution?

4. In an entrapment case, can the issue of the defendant's predisposition be determined without considering the interplay of governmental inducement and predisposition, that is, by relying solely upon the defendant's committing the criminal act without regard to his state of mind at the time when he was first approached by the government's agents and without regard to the manner in which he was approached?

5. Is the entrapment defense available only to a defendant who admits he committed the alleged crime?

6. If the Congress has the constitutional right to punish its own Members and the Executive and the Judiciary can punish them for the same offense, is the Double Jeopardy Clause violated?

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OCTOBER TERM, 1982

RAYMOND F. LEDERER,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Raymond F. Lederer respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this case on September 3, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, affirming the opinion of the United States District Court, is reported at 692 F.2d 823 (2d Cir. 1982).[1] A copy of the opinion is printed in the Appendix at A.1-81.

1. *Parties Involved:* In addition to the parties to this Petition, the judgment of the United States Court of Appeals for the Second Circuit affected Michael O. Myers, Angelo J. Errichetti, Louis

The opinion of the United States District Court for the Eastern District of New York, which was affirmed by the appellate court panel, is reported at 527 F.Supp. 1206 (E.D.N.Y. 1981). A copy of this opinion is printed in the Appendix filed with the Petition for Writ of Certiorari in the related case of *Frank Thompson, Jr. vs. United States*, which is incorporated herein. *Thompson* Appendix, 84A.

JURISDICTION

On September 3, 1982, the United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court. A.82. A petition for rehearing with suggestion for rehearing *in banc* was denied on November 17, 1982. A copy of the judgment denying rehearing is reprinted in the Appendix at A.83-4. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Article I, §5, cl. 2:

> "Each House may determine the rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two-thirds, expel a Member."

Article I, §6, cl. 1:

> ". . . for any speech or debate in either House, they [Senators and Representatives] shall not be questioned in any other Place."

NOTE — *(Continued)*

Johanson and Howard Criden (Docket nos. 81-1342, 81-1343, 1344, and 1446), Frank Thompson, Jr. and John M. Murphy (Docket nos. 81-1345 and 1346). The court below issued a single opinion and judgment incorporating all of these appeals. A.1-83.

Amendment V:

"No person shall . . . be deprived of life, liberty or property without due process of law; . . .

". . . nor shall any person be subject for the same offense to be twiced put in jeopardy of life or limb; . . ."

United States Code, Title 18:

§201. Bribery of public officials and witnesses

(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud on the United States; or

(3) being induced to do or omit to do any act in violation of his official duty; or

(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him.

§371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in

any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

§1952. Interstate and foreign travel or transportation in aid of racketeering enterprise

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

STATEMENT OF THE CASE

Petitioner Raymond F. Lederer, while a Member of the United States House of Representatives, was investigated and indicted for charges arising from the government's infamous ABSCAM operation. As were six other Congressmen in separate trials, petitioner was convicted of accepting money in return for promising to introduce private immigration bills.

In early 1978, the Federal Bureau of Investigation ("FBI") created ABSCAM to recover stolen art and securities. To give the illusion of a legitimate business opera-

tion, the FBI created Abdul Enterprises of which two fictitious sheiks were the owners. The company had an office in Holbrook, New York and a phony bank account in Chase Manhattan Bank. Melvin Weinberg ("Weinberg")[2] and FBI Agent Anthony Amoroso ("Amoroso"), who used the name "Tony DiVito", were portrayed as the sheik's representatives. In short, everything was done to convey the impression of wealthy Arabs interested in business ventures.[3]

Eighteen months after its inception, the operation designed to "sting" organized crime figures in their ongoing criminal endeavors evolved into a pursuit of elected officials for the purpose of placing them in a criminal scenario created by the government. This perversion of ABSCAM began during a phase of the operation's investigation of the role of organized crime in the casino industry in Atlantic City. One of the persons to come into contact with the undercover operatives was Angelo Errichetti ("Errichetti"), the Mayor of Camden and a New Jersey State Senator. He bragged to Weinberg and the agents of his political connections in New Jersey. He assured them he could pave the way for the "sheik" to obtain a casino license. At that point, efforts were made to identify and to record illegal payments to public officials who Errichetti claimed would help them secure the license.

At a meeting on a yacht, Errichetti introduced to the "sheik's representatives" Howard Criden ("Criden") and

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2. The FBI employed the talents of Weinberg, a convicted swindler and confidence man, at a salary of $3,000.00 a month. He was a professional con man retained by the federal government to commit white collar crime. So long as ABSCAM was alive, Weinberg received his salary and expenses.

3. The nature of the operation is graphically described by District Judge George C. Pratt in his opinion at 527 F. Supp. at 1209-10. A.10-12. How it worked was also described by the various district court judges in other ABSCAM cases. For example, *United States v. Kelly*, 539 F. Supp. 363, 365-367 (D.D.C. 1982); *United States v. Jannotti*, 501 F. Supp. 1182 (E.D. Pa. 1980).

Louis Johanson ("Johanson"), two Philadelphia lawyers representing a client who owned property in Atlantic City which he wished to develop. The purpose of the meeting was to discuss a legitimate business venture involving the sheik's building a casino on the client's property. During the cruise, Amoroso had a private conversation with Criden and Errichetti. The agent told the mayor that the sheik was concerned about his employees and wanted political protection in the event they were forced to leave their country. Amoroso later admitted that what he had in mind were Congressmen.[4] Errichetti assured Amoroso it could be done.

On the plane trip home, Errichetti and Criden talked of the sheik's willingness to pay for introductions to people with political titles. Errichetti suggested Criden enhance his client's casino deal by contacting officials to introduce to the sheik. He added that they would not be asked to do anything.

Back in Philadelphia, Criden told Johanson and another law partner, Ellis Cook, of his conversation with Errichetti and Amoroso. He asked Johanson, a City Councilman and a ward leader, to get in touch with two Philadelphia Congressmen with whom he had a political relationship.

One of the Congressman whom Johanson knew was Congressman Lederer, the petitioner. At the end of July, Johanson asked Lederer to meet with the sheik to talk about immigration matters and foreign investments in his district. Johanson told Lederer that Johanson's law firm could make a fee for the introduction. According to Cook, when Johanson told Lederer that the firm would receive $50,000.00, the Congressman told him he would be glad to do it for his friend Johanson and "all he

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4. Amoroso testified before Judge Fullam and Judge Pratt that he originated the idea of trying to bribe public officials to assist the sheik in immigration matters. A.13 fn. 4. Before Judge Pratt he stated unequivocally that he was after Congressmen specific

wanted was a $5,000.00 contribution for the spring primary". Johanson never told him that the sheik wanted him to or he had to sponsor legislation.

On September 11, 1979, Lederer arrived in New York where he was met by Johanson and Criden who drove him to the Hilton Inn. Errichetti accompanied Lederer to the meeting with the sheik's representatives. As Weinberg told him to do, Errichetti instructed Lederer how to act at the meeting.

After Lederer was introduced to Weinberg and Amoroso, he wasted no time in telling them what his priority was. He was interested in the port of Philadelphia and had obviously been told they were too. Throughout the entire meeting, Lederer reiterated his interest was bringing the sheik's money into Philadelphia.

The sheik's investing in the port and Philadelphia translated into employment for Lederer's constituents. He could not have been clearer when Lederer said, "Put my people to work and I'll show you what I can do".

The sheik's representatives assured Lederer of their employer's intentions of investing in Philadelphia. Amoroso assumed Errichetti had made this clear to him. Amoroso, in his role as president of Abdul, gave Lederer the impression that he would put the Congressman's "people to work". He certainly wanted Lederer to believe that the sheik was going to invest in America and was going to have his people working in Philadelphia. When Lederer said loyalty was a two-way street, Amoroso replied, "that's why we're gonna come into Philadelphia". In fact, the whole conversation was about the sheik coming to America to live and to invest in Philadelphia.

In this context, Lederer was willing to assist the sheik and his family as he had done for others in the past. However, before doing so, certain other conditions had to be met. First, the sheik had to be humanitarian and not an undesirable. Second, Lederer wanted to meet him.

Near the end of the meeting, the discussion was about arranging a meeting with the sheik himself. Then, after Lederer got up and was on his way out, Amoroso handed him a package containing $50,000.00, which was given to the lawyers whom Lederer understood were to receive a substantial fee. The lawyers, after giving Errichetti $20,000.00 and the sheik's representatives $5,000.00 and after placing $5,000.00 in an envelope marked for Lederer, split the money among themselves. The distribution of the fee was done outside of Lederer's presence.

Four months later, the news of ABSCAM broke. The government, in what the Department of Justice later admitted was "plainly prohibited by Department Regulations, FBI Operating Procedures, and the Code of Professional Responsibility", leaked the names of all public officials implicated in the ABSCAM operation to the news media. Thereafter, the public was inundated with statements and opinions of government officials and prosecutors. By the time Lederer stood trial, ABSCAM was a household word.

On May 28, 1980, Lederer was indicted in the Eastern District of New York for bribery, 18 U.S.C. §201(c), accepting an illegal gratuity, 18 U.S.C. §201(g), violating the Travel Act, 18 U.S.C. §1952, and conspiracy, 18 U.S.C. §371. Although he had been indicted with three others, Lederer stood trial alone.[5]

At his trial, Lederer argued that he had been entrapped. A.25-27. The government introduced no extrinsic evidence of Lederer's predisposition. It relied totally upon a video tape of Lederer's forty-five minute meeting with the undercover operatives.

After the jury's guilty verdict, the district court conducted extensive hearings to determine if the due

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5. Indicted with Lederer were Errichetti, Johanson and Criden. They were severed from Lederer after their convictions in a similar case involving Congressman Michael O. Myers.

process rights of Petitioner and the other ABSCAM defendants convicted in that jurisdiction were violated. In addition, it considered testimony from other proceedings involving ABSCAM. A.8-9. The district court ruled that there were no trial errors and Lederer's due process rights were not violated by the government.

On appeal, the United States Court of Appeals for the Second Circuit, by a panel of three circuit judges, upheld the district court's findings while conceding that the government's conduct in ABSCAM was subject to criticism. A.82. Petitioner sought a rehearing before the Second Circuit sitting *in banc*. On November 17, 1982, Petitioner's request for rehearing was denied. A.84.

REASONS FOR GRANTING WRIT

I. The Implications Of The Government's ABSCAM Investigation And Prosecution Of Members Of Congress Upon The Separation of Powers Doctrine And The Speech Or Debate Clause Of The Constitution Requires This Court To Define The Constitutional Line Separating The Executive And The Legislative Branches.

The ABSCAM operation, as it focused upon Members of Congress, invokes the constitutional doctrine of the separation of powers and the Speech or Debate Clause of the Constitution.[6] Because it raises serious questions affecting the independence of the Legislative Branch, it impacts upon the American system of government.

The issue is not whether the Executive can prosecute a member of the Legislative Branch. That question was resolved by this Court more than a decade ago in *United States v. Brewster*, 408 U.S. 501 (1972), where a divided Court held that the Speech or Debate

6. U.S. Const. art. I, §6, cl.1.

Clause did not immunize Congressmen from prosecution for bribery offenses.

The issue now arising from ABSCAM is whether the Executive can instigate and create the crime itself for the purpose of incriminating members of the Legislative Branch by tempting them without any reason to believe they were predisposed to commit a crime and then prosecuting them for it. The same dangers of a potentially vindictive Executive recognized by the Second Circuit itself in *United States v. Myers*, 635 F.2d 932, 936 (2d Cir. 1980), *cert. denied*, 449 U.S. 956 (1980) and this Court in *United States v. Johnson*, 383 U.S. 169, 181 (1966) and in *Brewster*, *supra* at 521-523, demand an examination of the government's conduct of an undercover operation aimed at members of the Legislative Branch.

The Second Circuit held that "the Constitution does not provide Members of the Legislative Branch with any extra protections beyond those guaranteed to all citizens". A.25. Consequently, it concluded that the Executive was not required to have a reasonable suspicion or probable cause of a Congressman's criminal activity or propensity before attempting to engage him in a criminal venture. The remedy for a legislator in such a situation, according to the panel, is "the traditional defense of entrapment". A.25. Therefore, it held that the Executive was free "to test the virtue of Members of a coordinate branch of government". A.25.

The focal point of the Second Circuit's analysis was the individual Congressional defendant and not the delicate balance between the Executive and the Legislative Branches. In this particular case, the more compelling issue is the American constitutional scheme of government. As this Court has said, "The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of indi-

vidual legislators". *United States v. Brewster*, 408 U.S. 501 at 507 (1972). *See also, United States v. Johnson*, 383 U.S. 169 (1966).

In analyzing the fundamental fairness of ABSCAM as it affected petitioner, who at the time of the New York meeting and his trial was a Congressman, one must consider that FBI Agent Anthony Amoroso and informant Melvin Weinberg actively sought to lure "Congressmen" before the cameras, the bait included financial investment in their Congressional districts and employment for their constituents,[7] the expectation was that the Congressmen would agree to assist the wealthy investors immigrate into this country, and the Congressmen had never previously abused their office.[8] In short, in assessing the validity of the Executive's actions in luring the Congressmen from the halls of Congress for the purpose of testing their virtue,[9] the Court must consider that the government agents created a scenario compatible with the activities and duties of an honest and effective Congressman.

Without any reason to believe there was ongoing corruption in the Congress,[10] the Executive Branch ac-

7. In his analysis of the claims made by Congressman Richard Kelly, Judge Bryant observed that the formula used to attract the officials "included a strong legitimate attraction". *United States v. Kelly*, 539 F.Supp. 363, 371 (D.D.C. 1982).

8. Judge Pratt found "no evidence . . . that any of the defendant congressmen committed any prior similar violations or engaged in any course of conduct or other circumstances that would warrant suspicions of criminality in the conduct of their legislative affairs". *Thompson* Appendix, 148A. *See also, United States v. Kelly, supra* at 371.

9. Judge Bryant found that the "sole objective of the operation" was to test the virtue of Members of Congress. *United States v. Kelly*, 539 F.Supp. at 373. In another Second Circuit ABSCAM case, Judge Kaufman said the operation was set up "to test the faith of those in the high echelons of government". *United States v. Alexandro*, 675 F.2d 34 at 43 (2nd Cir. 1982).

10. Both the Second Circuit and the district court acknowledged the absence of any reason to suspect the Congressional defendants of prior criminal inclinations. A.25. *See also, United States v. Kelly*, 539 F. Supp. at 371.

tively went after members of the Legislative Branch in an effort to obtain incriminating words and deeds resulting in their prosecution and fall from power. Permitting the government agents to pursue members of the Legislative Branch without any basis to believe they are corrupt and to create criminal activity for the purpose of implicating them in criminality created by the Executive Branch crosses the line separating the two powers. We do not dispute that the investigation of reputed or suspected corrupt Members of Congress and the use of undercover operatives in such an investigation are legitimate. However, creating crime to ensnare or to tempt innocent legislators is not.

The danger is obvious. It makes possible for a vindictive or manipulative Executive to destroy or to intimidate a Senator or a Congressman who does not share the same political philosophy or does not support the programs of the Administration.

It has been alleged that the Congressmen and the Senator implicated in ABSCAM were targeted because they did not support President Carter and instead supported Senator Kennedy as the Democratic nominee for President. Certainly, no one has proven nor probably ever will prove the allegation. What is possible is that a device such as ABSCAM, if it is tolerated and given the imprimatur of the Judicial Branch, could be the vehicle for such political reprisals and threats in the future.

The possibility that the Executive can contort or mold legitimate activity into the basis for prosecution intimidates and dampens the independence of the Legislative Branch. Faced with the potentiality of an ABSCAM Executive, Congressmen will be reluctant to engage in dialogue with their constituents, impairing their overall function. Thus, to allow the government's agents, without any scintilla of evidence of a pattern of bribe-taking among Congressmen in general and of any indicia of predisposition of a particular Congressman to take a bribe, to create crimes in a perfectly legitimate scenario

in order to ensnare Congressmen has a chilling effect on the effective relationship between a legislator and his constituents.

Another danger is that the Executive can use the artifice of an investigation to inquire into a legitimate legislative act. He may do so for purely political reasons. Using investigators posing as constituents, the Executive could surreptitiously question a Congressman's performance of his official acts and his reasons for voting for particular legislation. Thus, the guise of an investigation could provide a device to defeat the purpose of the Speech or Debate Clause.

The mere ability to investigate any Congressman or Senator it wishes invests the Executive with enormous power to eliminate opposition. Even if the investigation reveals no wrong doing, the harm may be done. In a world where public opinion is so influenced by the news media, one cannot underestimate the devastating effect of the mere disclosure of an investigation upon a public official. The results, no matter what they are, come too late.

To hold that the safeguard against such governmental abuses is the ability of a Member of Congress to say "no", as suggested by both the Second and Third Circuits,[11] is overly simplistic and unrealistic. We do not live in a world of perfect and infallible human beings. Everyone is vulnerable to temptation. Public officials are susceptible to the same problems and pressures as everyone else. Thus, the question arises — shall the Executive be permitted to exploit human frailties for political benefit?

Will allowing the Executive Branch to go after legislators who have enjoyed excellent reputations and have never been suspected of corruption undermine that

11. *United States v. Myers*, 635 F.2d 932 at 939 (2d Cir. 1980) *cert. denied*, 449 U.S. 956 (1980); *United States v. Jannotti*, 673 F.2d 578 at 606 (3d Cir. 1982) *cert. denied*, ____ U.S. ____, 102 S.Ct. 2906, 73 L. Ed. 2d 1315 (1982).

"bedrock of our political system" — the doctrine of the separation of powers? With its unlimited resources, the administration could relentlessly seek the opposition's breaking point. Once having found it, the Executive could destroy or cripple the legislature.

Where should the line be drawn? Unfortunately, in this case, the Second Circuit panel did not draw the line separating the two powers, that is, the Executive and the Legislative Branches. Though cognizant of the inherent dangers of political reprisal, it merely stated that the government did not cross the forbidden line. In not defining the permissable limits of the Executive's power to investigate members of Congress for crimes that it created, the Second Circuit has left the door open for a vindictive or manipulative Executive to destroy or to intimidate an unsympathetic legislator or even a hostile Congress.

The task of delineating the rights and the prerogatives of two coequal branches of government cannot be left to the Executive or the Legislative Branch as suggested by the Second Circuit. A.79. It is not for the Congress to decide whether ABSCAM was illegal. The interpretation of constitutional principles rests solely with the Judiciary. Consequently, it is the Judicial Branch which must accept the responsibility of protecting the constitutional doctrine of the separation of powers and insuring the independence of the Legislature.

How the ABSCAM objectives, methodology and possibilities are treated by this Court shall become the rubric for all future undercover operations affecting the Congress. If this Court fails to consider the constitutional implications of ABSCAM, it will give its tacit approval to future investigations of possibly a greater scope and extent into the Legislative Branch.

II. The Inability Of The Circuit Courts Of Appeals To Define The Standards To Be Applied In Disposing Of Due Process Challenges To The ABSCAM Operation And The Conflict Among The District Courts Regard-

ing the Legality Of ABSCAM Demonstrates The Need For This Court To Explain And To Clarify Its Decision In *Hampton v. United States* And To Determine Itself Whether The Government's Conduct Was So Outrageous As To Invoke This Court's Supervisory Power.

The unprecedented ABSCAM operation has been the subject of national debate. The law enforcement techniques employed by the FBI have been severely criticized by people in and out of government. In fact, the government's conduct in ABSCAM has been condemned by circuit judges[12] and district judges.[13] Thus, before such techniques, especially when employed to ensnare a member of the Legislative Branch, receive a final stamp of approval, this Court should examine the government's ABSCAM investigation in light of its impact upon the due process rights of the individuals involved and, at the same time, define what the *Hampton* "due process analysis"[14] requires.

Despite a professed commitment to protect the rights of individuals against the dangers inherent in undercover operations using informants, the Department of Justice failed miserably to follow its own guidelines in the ABSCAM investigation. The operatives went uncontrolled and unsupervised, they initiated crimes, they failed to monitor and to direct the activities of informant Melvin Weinberg and other middlemen, they tempted public officials without any reasonable basis for believing they were corruptible, they deputized middle-

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12. *See, United States v. Jannotti*, 673 F.2d at 612 (Judges Aldisert and Weis dissenting).

13. *See, United States v. Jannotti*, 501 F.Supp. 1182 (E.D. Pa. 1980); *United States v. Kelly*, 539 F.Supp. 363 (D.D.C. 1982). In another case involving Congressman Jenrette, Judge Penn reportedly has been critical of the government's conduct in ABSCAM. However, he has yet to issue an opinion.

14. *United States v. Hampton*, 425 U.S. 484 (1976).

men to set up and bring in the victims of the scam and they failed to correct inadequacies and questionable techniques when confronted with them — all of which were in contravention of the Justice Department's own guidelines and contradicted what Assistant Attorney General Heymann swore were the procedural safeguards employed in such operations and in ABSCAM specifically.

A Senate select committee investigating the ABSCAM operation found that Weinberg shared in at least one and probably more bribes intended for an official, repeatedly lied under oath during the ABSCAM trials and grand jury proceedings, received unauthorized gifts, failed to record all his conversations with suspects, continually duped his FBI superiors and was laxly supervised. The committee concluded that the FBI's conduct of the investigation "created unnecessary and undue risks to civil liberties".[15]

Despite their dismissing due process attacks upon the convictions of ABSCAM defendants, both the Second and Third Circuit Courts conceded that the government's conduct in ABSCAM was not unquestionable and was subject to criticism.[16] How the appellate courts reconciled their own reservations about the government's conduct in ABSCAM and their ultimate conclusion that it did not violate the defendant's due process rights is unclear.

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15. It would be impossible to catalog the multitude of instances of illegalities, improprieties, irregularities and inadequacies of the government's conduct in ABSCAM within the space permitted. Suffice it to refer to a sampling of the findings and criticisms of those who have examined ABSCAM. Only a full review on certiorari will reveal the totality of the government's overreaching.

16. Judge Newman wrote, "We are not passing judgment on the wisdom of the ABSCAM investigation, nor on whether the means by which is was conducted conformed to internal administrative standards of the Department of Justice or to other standards that the Executive Branch might choose to adopt or the Legislative Branch might require. . . . The conduct of the investigation, though

While recognizing that this Court has established a separate constitutional defense based upon due process principles where the government's conduct and participation in criminal opportunities created by it is so outrageous as to require the acquittal of even a predisposed defendant, both the Second Circuit and the Third Circuit failed to clearly define the standard of outrageousness against which they tested the ABSCAM operation.

It is obvious that they were not sure of the standards required in the due process analysis. In fact, the Third Circuit majority acknowledged the elusiveness of a definition. It stated:

> "If the contours of the entrapment defense are imprecise, we have at least been able to make an effort to delineate them. A similar delineation of the conduct circumscribed by the due process defense is, at best, elusive. Part of the difficulty stems from the differing views by those who must interpret the constitutional standard as to what are 'immutable and fundamental principles of justice.'" *United States v. Jannotti*, 673 F.2d 578 at 606 (3d Cir. 1982).

Likewise, the Second Circuit found the definition lacking. In fact, it appeared that the panel did not know what the boundaries were. Throughout its opinion, the panel referred to the "outrageous" or due process standard as a vague concept. For example, in discussing the government's conduct, Judge Newman stated:

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subject to some criticism, affords no basis for rejecting the convictions". A.79-80.

Similarly, the Third Circuit warned that its decision in the *Jannotti* case should not be considered an "imprimatur either of approval or disapproval on the government's conduct". The majority indicated that it had differing views as individuals on the "necessity or advisability of the entire ABSCAM project". 673 F.2d at 610.

"*Whatever may be the due process* limit of governmental participation in crime, it was not reached here". (Emphasis supplied). A.29.

"*Whatever conduct might transgress the standard* outlined in *Hampton* and *Russell*, the facts of the investigation are not even close to the line". (Emphasis supplied). A.41.

"Perhaps at some point deliberate governmental efforts to render ambiguous events over which agents can exercise considerable control would transgress due process limits of fundamental fairness. *Wherever those limits [due process] might be*, they have not been crossed in these cases". (Emphasis supplied). A.43.

Yet, two district judges, Judges Fullam and Bryant, who had the opportunity to assess the credibility of the witnesses during extensive hearings, found that the bounds of fair play had been exceeded and the government's conduct was outrageous. In their view, the due process standard had been violated. *See, United States v. Jannotti*, 501 F.Supp. 1182 (E.D. Pa. 1980); *United States v. Kelly*, 539 F.Supp. 363 (D.D.C. 1982).

This uncertainty with respect to the definition and the parameters of the "due process" defense is understandable. Since this Court's decision in *Hampton*, there has been no articulation of what constitutes "outrageous" conduct so as to invoke the judiciary's supervisory power over law enforcement and the administration of justice. Though district courts and circuit courts have entertained such claims, the Supreme Court has not decided any case involving the entrapment and due process defenses in the context of an undercover operation of the scope and extent of ABSCAM. This case presents the opportunity for this Court to issue the definitive word on the parameters of these defenses and the differences between them. In addition, it points out the need for this Court to establish the limits and standards of law en-

forcement activities in the government's instigation of crimes which it intends to prosecute.

III. The Dispute Among The Federal Courts Regarding Whether A Defendant's Predisposition In An Entrapment Case May Be Proven Solely By His Committing The Act And Without Considering The Governmental Inducement Requires Resolution By This Court

Where a defendant has been induced to commit a crime by the government's agents, he cannot be convicted unless he was "predisposed". *United States v. Hampton*, 425 U.S. 484 (1976); *United States v. Russell*, 411 U.S. 423 (1973); *Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932). Thus, the government must prove beyond a reasonable doubt that the defendant possessed a criminal predisposition when the government agents presented him an opportunity to commit the crime. *Sorrells v. United States*, 287 U.S. at 442.

What is "predisposition" and how to determine a person's predisposition are questions which have plagued the courts. Admittedly, proving a defendant's predisposition may be difficult. Nevertheless, because there is lacking any evidence of prior bad conduct or reasonable suspicion of criminal intent does not excuse the government from proving criminal predisposition. To rely solely upon a defendant's action at the time of the commission of the crime relieves the government of its burden and effectively eliminates the entrapment defense because it ignores the equally important factor of governmental inducement.

Entrapment occurs when the government agents "implanted the criminal design in the mind of the defendant". The inducement causes the act. Consequently, it is when the inducement is made and not when the subsequent action occurs that is the relevant time frame for determining a defendant's predisposition.

Equally important is the inducement itself, that is, the type of and manner in which the inducement is presented. Thus, any attempt to determine predisposition without a full evaluation of inducement is worthless.

Lederer requested the standard jury instruction on the law of entrapment as approved by this Court in *United States v. Russell*, 411 U.S. at 427. He requested that the jury be instructed to acquit him if it had a reasonable doubt whether he had "the previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some officer or agent of the government". Over Lederer's objection, the trial judge instead instructed the jury that the defense applies only to a person who was "unwilling to commit an unlawful act until induced or persuaded" by government agents. Thus, the district court equated lack of "predisposition" with the "unwillingness" to commit the crime.

The trial court further told the jury that the time for "determining the question of predisposition" was the September 11th meeting, the videotape of which had been shown to the jury. The relevant time for determining the defendant's predisposition is not when the crime is being committed or has been completed but when the defendant is first approached by the government's agents with the criminal design. *Sorrells v. United States*, 287 U.S. at 442. It is the defendant's state of mind and inclinations before his initial exposure to the government agent that is the focal point of the inquiry. Thus, the jury was precluded from determining whether the criminal seed had been sown by the government agents prior to the meeting.

Similarly, the Second Circuit rejected petitioner's claim that he had been entrapped as a matter of law. Obviously, because it could find no other indicia of a prior criminal intent or purpose, the panel also relied upon the videotape of the September 11th meeting. It concluded that petitioner's predisposition was established by his

"ready response" to the inducement at that meeting. A.26-27.

The approach taken by the district court and the circuit court demonstrates a misapprehension of the law of entrapment. The emphasis was placed not on whether the government had induced petitioner to commit the crime but whether he performed the criminal act. The problem with this approach is that it puts the proverbial "cart before the horse".

The error in the district and the circuit courts' interpretation and application of the entrapment defense is apparent and emphasized in this particular case. Both ignored the manner in which the government approached the petitioner to get him to come to the meeting in the first instance. They overlooked the lure of financial investments in petitioner's Congressional district, which District Judge Bryant characterized as "legitimate incentives designed to encourage apparently innocent persons. . .". *United States v. Kelly*, 539 F. Supp. 363 at 371 (D.C.C. 1982). According to the government's evidence, the delegated middlemen, Criden and Johanson, were dispatched to bring in Congressmen in July and almost immediately thereafter Johanson asked petitioner to meet with representatives of a wealthy sheik "to talk about immigration matters and finances in the district".

There are cases where a problem will not arise because the inducement and the commission of the crime occur simultaneously. It is in such a case as this one where the initial contact by the government agents took place a few months before the September 11th meeting that the problem arises. How petitioner was first approached and what transpired from the first contract until the meeting is pertinent and relevant to the issue of government inducement.

No where in the decisions of this Court is there language from which one can conclude that predisposition may be proven by reference solely to the defendant's

commission of the crime. In fact, in the two most recent entrapment cases decided by this Court, *Hampton* and *Russell*, the element of predisposition had been conceded. This Court has not given any direction as to the requisite proof of criminal predisposition.

If the government is permitted to mold and manufacture the "ready response" evidence and then rely upon it as the sole evidence of predisposition, there will be no entrapment defense. In effect, proof of the alleged criminal act is all that the government would have to prove. Inducement would become irrelevant and the government could dangle the largest carrot for anyone prior to the criminal scene which it has written, directed and produced for later display to a jury to prove a defendant's predisposition. Therefore, it is necessary to clarify the relationship between inducement and predisposition and to resolve the confusion surrounding the sufficiency of "ready response" evidence of predisposition.

IV. Whether Prosecutorial Use Of A Report Filed By A Congressman In the House of Representatives Violates The Speech Or Debate Clause Of the Constitution Has Not And Should Be Decided By This Court.

The prosecution, over objection, introduced a copy of the Ethics and Financial Disclosure Statement which petitioner had filed with the Clerk of the House of Representatives on June 2, 1980. Ruling on the objection, the district judge found that petitioner had waived the protection of the Speech or Debate Clause[17] by filing it — a similar argument made by the government and rejected by this Court in *Helstoski v. Meanor*, 422 U.S. 477 (1979).

The use of the disclosure statement at petitioner's trial was improper and unconstitutional if it was pro-

17. U.S. Const. art. 1, §6, cl. 1

tected by the Speech or Debate Clause. Members of the Congress may not be questioned about their "legislative acts" or the motivation for the performance of those acts. *United States v. Johnson*, 383 U.S. 169 (1966); *Kilbourn v. Thompson*, 103 U.S. 168 (1881). Hence, the question becomes: Does the financial statement constitute a "legislative act" within the meaning of the privilege?

The Speech or Debate Clause has not been literally construed. It has been interpreted "broadly to effectuate its purposes". *United States v. Johnson*, 383 U.S. at 180. Within its protective ambit is anything "generally done in a session of the House by one of its members in relation to the business before it". *Kilbourn v. Thompson*, 103 U.S. at 204. It extends to "the communication process by which Members participate in committee and House proceedings with respect to . . . matters which the Constitution places within the jurisdiction of either House." *Gravel v. United States*, 408 U.S. 606 (1974).

The Constitution specifically provides that the House may determine its own rules and proceedings. U.S. Const. art. I, §5, cl. 2. In filing the Ethics and Disclosure Statement with the Clerk of the House, Lederer was complying with House rules, which were established to monitor Members' observance of the limitations on outside earned income. RULES OF THE HOUSE OF REPRESENTATIVES, RULES XLVII, 95th Cong., 2nd Sess. 635-36 (1979). Thus, because "keeping its own house" in order is the constitutional prerogative of the House, anything done in that regard, including the filing of reports, is shielded by the Speech or Debate Clause.

This case does not involve a prosecution for filing a false financial report. If it did, there would be no question that it was permissable to use the report at trial. Here, the prosecution used the report in an unrelated prosecution. Whether this evidentiary use was violative of the Speech or Debate Clause is an important issue which has not been and should be addressed by this Court.

V. This Court Should Settle The Conflict Among The Circuits On The Issue Of Whether A Defendant Asserting An Entrapment Defense Must First Admit The Elements Of The Crime Charged, Including the Requisite Criminal Intent.

It has generally been assumed that entrapment is a defense available only to a defendant who admits that he has committed the crime charged. What happens to the defendant who agrees that he was present at a governmentally produced scene because he was induced to come there but maintains that what he did there was equally consistent with innocence? Is he deprived of the opportunity to have a jury decide in the first instance whether he had committed the crime because he also requests that they decide whether he was entrapped if they resolve the first issue against him?

The government's own evidence regarding the petitioner's prior intent or reason for going to the September 11th meeting was elicited through Ellis Cook. According to Cook, Johanson told him that Lederer only wanted a $5,000.00 campaign contribution from the payment intended for his friend Johanson's law firm. While acknowledging that in some cases there may be a "close question as to whether money was received as an illegal bribe or a lawful contribution", A.46-47, the Second Circuit panel held it against the Petitioner because he did not testify at trial that he thought he was receiving a political contribution. It said, ". . . he made no claim at trial that he thought the shiek's representatives were making a donation to his campaign. His sole defense was entrapment". A.47, fn 20. Thus, because petitioner argued that he was induced by the government to come to the meeting to receive the payment, the appeals court would preclude him from submitting to the jury the issue of whether the payment was illegal (a bribe) or legal (a campaign contribution).

The jury should be first asked to decide whether a defendant has committed a crime. If it decided that he

has, the jury can then decide whether he should be acquitted because he was entrapped, having been induced by the government to commit the acts which he had not been predisposed to do. The jury should not be precluded from deciding the issue of guilt because the defendant chose to argue entrapment.

The Second Circuit has had the opportunity to canvass the circuits to find how they treat this issue. In *United States v. Valencia*, 645 F.2d 1158 (2d Cir. 1980), it detailed the state of the law in each circuit. It concluded that "the circuits appear to be in conflict, our own cases are not altogether consistent, and the Supreme Court cases do not address the question". *Id.*, at 1172.

The resolution of this splitting question has important implications in a criminal intent case. Possibly a defendant committed the physical acts charged but had not possessed the criminal intent.[18] *See*, *United States v. Greenfield*, 554 F.2d 179 (5th Cr. 1977). Depending upon the circuit in which he is tried, the defendant can or cannot argue that he was entrapped if he doesn't first admit all of the elements of the crime charged. *See*, *United States v. Valencia*, 645 F.2d at 1170.

Now is the time for this Court to settle this question in the interest of uniformity among the circuits.

VI. This Court Has Not Decided Whether The Double Jeopardy Clause Of The Constitution Has Been Violated Where A Member Of Congress Has Been Subjected To Punishment By The Executive And The Judicial Branches On The One Hand And By The Congress On The Other For The Same Offense.

Implicit in the Second Circuit's opinion is the rationale that even though the Congress may punish or ex-

18. For example, in the ABSCAM cases, the government cleverly mixed together legal and illegal inducements. If the defendant chose to submit the entrapment issue to the jury, he would have to admit unwillingly that he was induced to help the sheik for a bribe and not for the promise of investments in his Congressional district.

pel one of its own members for wrongdoing, the Executive can prosecute and the Judiciary can also punish that member for the same wrongdoing. Does this double punishment violate the Double Jeopardy Clause?[19]

If there is unconstitutional double punishment, then only one Branch can punish an errant Member of Congress. Which one shall it be?

Obviously, the answers to these questions raise important issues bearing upon the respective rights and prerogatives of the three branches of government. Thus, because these issues have not been answered, this Court should examine this case in light of the constitutional principles of the separation of powers and the double jeopardy clause.

CONCLUSION

For the reasons set forth in this Petition and in the petitions filed by the other "parties involved" who are identified at page 1 of this Petition,[20] a writ of certiorari should issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

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Attorney for Petitioner,
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19. U.S. Const. Amend. V.

20. The factual statements and the reasons for granting a writ of certiorari set forth in the related petitions of Michael O. Myers, Angelo Errichetti, Louis Johanson, Howard Criden, Frank Thompson, Jr. and John M. Murphy are incorporated herein and adopted by Raymond F. Lederer insofar as they apply to and are consistent with his Petition.

Supreme Court, U.S.
FILED
JAN 14 1983
ALEXANDER L. STEVAS
CLERK

No. 82-1188

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

RAYMOND F. LEDERER,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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NOTE:

The Opinion of the United States District Court for the Eastern District of New York is being reproduced in the Appendix filed by Petitioner in Frank Thompson, Jr. vs. United States, which is incorporated in this Appendix.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 904, 905, 906, 907, 840, 841, 855
—August Term, 1981

(Argued April 5, 1982 Decided September 3, 1982)

Docket Nos. 81-1342, 1343, 1344, 1446, 1345, 1346, 1347

UNITED STATES OF AMERICA,

Appellee,

—v.—

MICHAEL O. MYERS, ANGELO J. ERRICHETTI, LOUIS JOHANSON, and HOWARD L. CRIDEN,

Defendants-Appellants.

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK THOMPSON, JR. and JOHN M. MURPHY,

Defendants-Appellants.

UNITED STATES OF AMERICA,

Appellee,

—v.—

RAYMOND F. LEDERER,

Defendant-Appellant.

Before:

LUMBARD, FRIENDLY and NEWMAN,
Circuit Judges.

Appeals from judgments of conviction entered in the District Court for the Eastern District of New York (George C. Pratt, Judge), after three separate jury trials in which four United States Congressmen and three other defendants were found guilty of violations of 18 U.S.C. §§ 201(c), 201(g), 203(a), and 371, arising out of the Abscam investigation. Judgments affirmed on all counts as to all appellants, except Count Three (section 203(a)) of the indictment against John M. Murphy, which is reversed and remanded for a new trial.

NEIL JOKELSON, Philadelphia, Pa. (Rochelle Newman, Jokelson and Rosen, Philadelphia, Pa., on the brief), *for defendant-appellant Myers*.

RAYMOND A. BROWN, Newark, N.Y. (Henry F. Furst, Newark, N.Y., on the brief), *for defendant-appellant Errichetti.*

JOHN J. DUFFY, Philadelphia, Pa. (Steven H. Gifis, Alan Dexter Bowman, Princeton, N.J., on the joint brief for Myers, Errichetti, and Johanson), *for defendant-appellant Johanson.*

RICHARD BEN-VENISTE, Washington, D.C. (Ben-Veniste & Shernoff, Washington, D.C., on the brief), *for defendant-appellant Criden.*

TIMOTHY SAVAGE, Philadelphia, Pa., *for defendant-appellant Lederer.*

DANIEL H. POLLITT, Chapel Hill, N.C., and Frank Askin, Newark, N.Y. (Neal Rutledge, Washington, D.C., on the brief), *for defendant-appellant Thompson.*

MICHAEL E. TIGAR, Washington, D.C. (Samuel J. Buffone, Linda Huber, Tigar, Buffone & Doyle, Washington, D.C., on the brief), *for defendant-appellant Murphy.*

EDWARD KORMAN, U.S. Atty., and Lawrence Sharf, Sp. Atty., Brooklyn, N.Y. (Thomas P. Puccio, Atty-in-Charge, Organized Crime Strike Force, Edward A. McDonald, Sp. Atty., Gregory J. Wallance and Vivian Shevitz, Asst. U.S. Attys., Brooklyn, N.Y., on the briefs), *for appellee.*

NEWMAN, *Circuit Judge*:

In *United States v. Myers*, 635 F.2d 932 (2d Cir.), *cert. denied*, 449 U.S. 956 (1980) (*Myers I*), we ruled that the Government had not violated the defendant's constitutional rights as a Member of Congress by requiring him to stand trial on charges of bribery arising out of an undercover "sting" operation now well known to the nation as Abscam. *See also United States v. Murphy*, 642 F.2d 699 (2d Cir. 1980). The *Myers* ruling, made in advance of trial, was based on the face of the indictment that had been returned. Now before us are appeals from judgments of conviction entered in the Eastern District of New York (George C. Pratt, Judge), after three separate jury trials in which four Congressmen and three co-defendants were found guilty of various offenses related to corruption of public office arising out of the Abscam investigation. Nos. 81-1342, 81-1343, 81-1344, and 81-1446 are appeals from convictions in the joint trial of appellants Michael O. Myers, formerly Congressman from the First District of Pennsylvania; Angelo J. Errichetti, formerly Mayor of Camden, New Jersey; Louis Johanson, formerly a member of the City Council in Philadelphia, Pennsylvania; and Howard L. Criden, a law partner of Johanson's. No. 81-1347 is an appeal from the conviction of appellant Raymond F. Lederer, formerly Congressman from the Third District of Pennsylvania, at a separate trial. Nos. 81-1345 and 81-1346 are appeals from the convictions of Frank Thompson, Jr., formerly Congressman from the Fourth District of New Jersey, and John M. Murphy, formerly Congressman from the Seventeenth District of New York, at a joint trial. Though some of the three trials present distinct issues, all seven appellants raise questions of such similarity that we have found it appropriate to consider all of the claims in one opinion.

For the reasons that follow, we have concluded that all of the judgments should be affirmed on all counts, with the exception of Count Three of the indictment against Murphy, as to which we reverse and remand for a new trial.

I.

Myers, Errichetti, Johanson, and Criden were charged in a three-count indictment. Count One alleged a conspiracy in violation of 18 U.S.C. § 371 (1976) to defraud the United States and to violate 18 U.S.C. § 201, punishing bribery and the receipt of bribes by public officials including Members of Congress. This count alleged that the conspiracy sought to defraud the United States of the Government's right (a) to the honest service of Congressman Myers "in relation to matters before the House of Representatives performed free from corruption"; (b) to have the "official action" of Congressman Myers "in attempting to influence decisions of departments and agencies of the United States in relation of matters of immigration and residence performed free from corruption"; (c) to have the immigration laws "administered honestly and impartially, free from improper and undue pressure and influence"; and (d) to have officials enforcing the immigration laws "perform their official duties free from impairment and obstruction by the exercise upon them of corrupt . . . pressure and influence." The conspiracy to violate section 201 was alleged to consist of the defendants' agreeing to demand and receive money for Congressman Myers in return for the Congressman's "being influenced in his performance of official acts."

Count Two alleged bribery in violation of 18 U.S.C. § 201(c) and § 2. This count alleged that Congressman

Myers, aided and abetted by the other co-defendants, agreed to receive and received money "in return for" his "being influenced in his performance of official acts as a member of Congress, to wit, his decisions and actions in a matter involving immigration, residency and citizenship of foreign nationals which might at any time be pending or which might by law be brought before the House of Representatives and departments" of the Government. Count Three alleged that all four defendants traveled in interstate commerce to carry on the unlawful activity of bribery, in violation of 18 U.S.C. § 1952 and § 2.

The charges stemmed from an elaborate undercover "sting" operation conducted by the Federal Bureau of Investigation. Three FBI agents and a private citizen, all acting in an undercover capacity, purported to be representatives of two Middle Eastern sheiks operating a fictitious entity known as Abdul Enterprises, Ltd. The undercover operatives let it be known that their principals were interested in investing money in the United States and immigrating to this country. The core allegation against Myers and his co-defendants was that on August 22, 1979, Myers received $50,000 in return for his promise to introduce private immigration bills permitting the sheiks to remain in the United States and to take other necessary action including intervention with the State Department. A jury trial was begun on August 11, 1980, and concluded on August 29, 1980. The jury convicted all four defendants on all three counts. Errichetti and Criden were each sentenced to concurrent terms of six years' imprisonment and fines totalling $40,000. Myers and Johanson were each sentenced to concurrent terms of three years' imprisonment and fines totalling $20,000.

In a separate indictment, Lederer was charged, along with Errichetti, Johanson, and Criden, in a four-count

indictment. Three of the counts paralleled the conspiracy, bribery, and interstate travel counts of the Myers' indictment. In addition, a fourth count alleged receipt of an unlawful gratuity by Lederer, in violation of 18 U.S.C. § 201(g). This count alleged that Lederer, aided and abetted by his co-defendants, agreed to receive and received money "for and because of" the performance of his official duties in a matter involving immigration of foreign nationals. The core allegation in this indictment was that on September 11, 1979, Lederer received $50,000 in return for his promise to help the sheiks with their immigration problems. Lederer's co-defendants were severed from his case after their convictions in the *Myers* case. Lederer's trial began January 5, 1981, and concluded January 9, 1981. The jury convicted Lederer on all four counts. He was sentenced to concurrent terms of three years' imprisonment and fines totalling $20,000.

In a third indictment, Thompson and Murphy were charged, along with Criden and Joseph Silvestri, a New Jersey businessman, in a five-count indictment. Counts One, Two, and Four paralleled the conspiracy, bribery, and interstate travel counts of the Myers' indictment. Count Three charged a so-called conflict of interest, in violation of 18 U.S.C. § 203(a). This count alleged that Thompson and Murphy, aided and abetted by Criden, agreed to receive and received money "as compensation for services to be rendered before departments, agencies and officers of the executive branch of the Government" in a matter involving immigration of foreign nationals. Count Five, paralleling a count of the Lederer indictment, charged receipt of an unlawful gratuity, in violation of 18 U.S.C. § 201(g). The core allegation in this indictment was that on October 20, 1979, Murphy received $50,000, subsequently shared with Thompson, in return

for their promises to help the sheiks with their immigration problems. The charges against Criden and Silvestri were severed by agreement from the charges against Thompson and Murphy. Trial (the second in the sequence of three) began on November 10, 1980, and concluded on December 3, 1980. Before the case went to the jury, Judge Pratt dismissed Count Four charging unlawful interstate travel. The jury found Thompson guilty on Counts One, Two, and Five charging conspiracy, bribery, and receipt of an unlawful gratuity; he was found not guilty on Count Three charging conflict of interest. Murphy was found guilty on Counts One, Three, and Five charging conspiracy, conflict of interest, and receipt of an unlawful gratuity; he was found not guilty on Count Two charging bribery. Thompson was tentatively sentenced to the maximum allowable terms, pursuant to 18 U.S.C. § 4205(c), pending further consideration of his medical condition.[1] Murphy was sentenced to concurrent terms of three years' imprisonment and fines totalling $20,000.

In the interim between the conclusion of the three trials and the sentencing of all appellants, Judge Pratt conducted a consolidated hearing to consider various claims by all seven appellants that the Government's conduct in the Abscam investigation and in the prosecution of the charges at trial violated rights protected by the Due Process Clause of the Fifth Amendment. In considering these allegations, Judge Pratt took testimony during a 16-day "due process" hearing conducted in January and February, 1981. Judge Pratt also permitted the seven appellants to rely upon evidence pertinent to their due

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[1] Imposition of a tentative sentence pursuant to 18 U.S.C. § 4205(c) (1976) does not alter the finality of the judgment of conviction for purposes of our appellate jurisdiction. *Corey v. United States*, 375 U.S. 169, 174-76 (1963) (construing predecessor statute).

process claims that had been presented in other proceedings stemming from the Abscam investigation. These included the record of the trial and the "due process" hearing concerning charges against former United States Senator Harrison A. Williams, Jr., of New Jersey, in the Eastern District of New York, and the trial and "due process hearing records of charges against former Philadelphia Councilmen Harry P. Jannotti and George X. Schwartz in the Eastern District of Pennsylvania (John P. Fullam, Judge),[2] against former Congressman John W. Jenrette and a co-defendant in the District of Columbia (John G. Penn, Judge), and against former Congressman Richard Kelly and two co-defendants in the District of Columbia (William B. Bryant, Judge).[3] Based upon this comprehensive record, Judge Pratt, in a detailed and thoughtful opinion, denied the due process contentions of the seven appellants as well as their multitude of other claims attacking the validity of their convictions. *United States v. Myers*, 527 F. Supp. 1206 (E.D.N.Y. 1981).

II.

The background of the Abscam operation is described by Judge Pratt as follows:

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2 Judge Fullam set aside the jury verdicts that had been returned against Jannotti and Schwartz, *United States v. Jannotti*, 501 F. Supp. 1182 (E.D. Pa. 1980), but on appeal the Third Circuit reinstated the verdicts, *United States v. Jannotti*, 673 F.2d 578 (2d Cir. 1982) (*en banc*), *cert. denied*, 50 U.S.L.W. 3903 (U.S. June 7, 1982).

3 Judge Bryant set aside the jury verdicts that had been returned against Kelly and his co-defendants and ordered a new trial for the co-defendants. *United States v. Kelly*, 539 F. Supp. 363 (D.D.C. 1982), *appeal docketed*, No. 82-1660 (D.C. Cir. June 15, 1982).

"Abscam" is the code word given by the Federal Bureau of Investigation to an undercover "sting" operation conducted out of the FBI office at Hauppauge, Long Island, New York, under the supervision of agent John Good. Abscam began after Melvin Weinberg in 1977 was convicted in the Western District of Pennsylvania on his plea of guilty to fraud. In return for a sentence of probation Weinberg agreed to cooperate with the FBI in setting up an undercover operation similar to the London Investors, Ltd. "business" that Weinberg had used with remarkable success before his arrest and conviction in Pittsburgh.

For most of his life Weinberg had been a "con man" operating in the gray area between legitimate enterprise and crude criminality. For a number of years in the 1960s and early 1970s, he had been listed as an informant by the FBI and had provided his contact agent from time to time with intelligence about various known and suspected criminals and criminal activities in the New York metropolitan area and elsewhere, for which he had received in return occasional small payments of money. When he was arrested on the charge that led to his guilty plea, his informant status was cancelled, later to be reinstated after his guilty plea and agreement to cooperate with the FBI.

As agent-in-charge of the FBI's Long Island office Good was, at all times, the supervising agent for Abscam. Initially, Weinberg worked directly under special agent John McCarthy who later was replaced by special agent Anthony Amoroso. Both McCarthy and Amoroso worked undercover with Weinberg.

The general pattern of the "scam" or "sting" operation reflected Weinberg's earlier theme of representing wealthy Arab interests who had large sums of cash available for business opportunities in this country. When operating outside the law in Huntington, Long Island as London Investors, Weinberg's method had been a "front-end scam" for real estate investment wherein he would promise to obtain large loans for his victims and pick-up "appraisal" or "processing" fees of several thousand dollars, but without ever producing the final loans.

Although not identical to London Investors, the initial plan developed by Weinberg and the FBI was similar. Weinberg was to present himself as a business agent for "Abdul Enterprises", an organization backed by two extremely wealthy Arab sheiks looking for American outlets for their cash. He would pass the word of big money available for deals to other con men and people who move between the legitimate and illegitimate. If criminal proposals appeared, appropriate action would be taken by the FBI.

Weinberg and the agents set up business in an office in Holbrook, Long Island. The FBI's code name "Abscam" came from the first two letters of "Abdul", combined with the word "scam".

At first Abscam's focus was upon stolen and forged securities and stolen art work. Other "investment" opportunities soon presented themselves, and quickly the investigation turned itself toward Atlantic City and the gambling casinos which were then being proposed and constructed. As word spread about Weinberg's contact with virtually inexhaustible Arab funds, Angelo Errichetti, who was both mayor

of Camden, New Jersey, and a New Jersey state senator, came on the scene. Errichetti claimed to have extraordinary influence in obtaining gambling casino licenses, power over the commissioners who issued the licenses, connections with organized crime, ability to deal in narcotics, guns and counterfeit securities, as well as intimate knowledge of which members of the New Jersey legislature could be bought.

Errichetti brought to the undercover agents Howard Criden, a Philadelphia lawyer seeking to promote a gambling casino in Atlantic City. In July of 1979, Errichetti and Criden met with Weinberg and Amoroso on the sheiks' yacht in Florida to discuss financing for the proposed casino that a client of Criden's wanted to build. In the course of the day Amoroso and Errichetti discussed the problem that might be faced by the sheiks should a revolution occur in their country and should they want to come to the United States as permanent residents. Amoroso told Errichetti that he thought cooperation of public officials would be needed and that money would be no problem.

Immediately after this conversation Errichetti and Criden formed an alliance in which they undertook to produce for Amoroso and Weinberg public officials who, in return for money, were willing to use their influence with the government on the sheiks' behalf. Meetings were arranged at various locations in New York, Philadelphia and Washington where the FBI monitored the proceedings with concealed videotape cameras the microphones. Where videotape was not feasible, audio recordings were used.

527 F. Supp. at 1209-10.

Once the focus of Abscam shifted to the "asylum scenario,"[4] as the parties at the trials characterized the plan to have Abdul Enterprises offer cash to public officials in return for help on immigration matters, events rapidly unfolded, leading to the incidents on which the charges against the seven appellants were based. After returning to Philadelphia from the cruise on the yacht, Criden told his law partners, Johanson and Ellis Cook, that Errichetti had told him they could make substantial sums of money if they knew any Congressmen who would be willing to meet the sheik or his representatives. Cook testified for the Government under a grant of immunity. Criden reported that the money, $100,000, would be paid directly to each Congressman and then shared with the law partners. The purpose, according to Criden and Johanson, was that by meeting and paying the Congressman, the sheik would have a "friendly face," someone "that sort of owed him a favor" and would "help the sheik come into this country" and also help members of his family. Criden suggested that Johanson should contact Myers and Lederer, since Johanson knew both Congressmen. Johanson then contacted Myers and reported that Myers was willing to attend the proposed meeting.

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4 There is room for dispute as to who originated what came to be called the "asylum scenario," the willingness of Abdul Enterprises to pay money to public officials in return for help with future immigration problems that the sheiks might encounter. Weinberg testified before Judge Fullam that the idea first occurred to him while on the yacht on July 26, 1979, as a result of a suggestion of Criden. Agent Amoroso testified before Judge Fullam and Judge Pratt that he thought of the idea the previous day as a result of a newspaper article about the immigration problems of former Nicaraguan President Anastasio Somoza. The Government argued to Judge Bryant that the idea was originated by Errichetti, Criden, and Myers. At least a general reference to the idea was broached by Weinberg to George Katz, a defendant in another Abscam case, in a recorded telephone conversation held on July 14, 1979.

The Payment to Myers. The first meeting with Myers took place on August 22, 1979, at the Travelodge International Hotel near Kennedy Airport on Long Island. Myers, Johanson, Criden, and Errichetti drove from New Jersey and Pennsylvania to the Pan American terminal at the airport, where they met for a brief conversation. As all four understood, only Myers and Errichetti were to attend the hotel meeting with the sheik's representative. Just prior to the meeting the FBI instructed Weinberg to inform Errichetti in the hotel lobby that the previously mentioned figure of $100,000 had been reduced to $50,000. Errichetti and Myers then met with Amoroso (who used the name Tony DeVito) and Weinberg in a hotel room. The meeting was recorded on videotape. Early in the conversation, Myers boasted of his influence in Congress. When Amoroso mentioned his conversation on the yacht with Errichetti concerning the sheiks' possible immigration problems, Myers replied, "Absolutely. Where I could be of help in this type of a matter, first of all, is private bills that can be introduced." Myers explained that delay was important in immigration matters and said, "[I]f I wanta keep somebody in the country, all I do is introduce a private bill." Later in the conversation, Amoroso told Myers that his employer was planning major investments in the United States, possibly including something in Philadelphia. Myers agreed with Amoroso that such an investment in his district would give him "a little protection," and added that it would provide a reason to go "full force and, ah, not that I won't otherwise," and the "perfect opportunity to raise hell before Congress." At the end of the meeting Amoroso handed Myers an envelope containing $50,000 in $100 bills. Amoroso said, "Spend it well"; Myers replied, "Pleasure."

After leaving the hotel, Errichetti met briefly with Criden at Kennedy Airport. Criden then returned to his law office in Philadelphia with the envelope Amoroso had handed to Myers. Criden reported to Cook that Errichetti had taken $15,000 for himself. Shortly thereafter Myers and Johanson arrived and conferred with Criden. Cook was then told that Myers had agreed to take only $15,000; of the remaining $20,000, Criden received $9,000 or $9,500, Johanson received $6,000 or $6,500, and Cook received $4,500.

At a subsequent meeting on January 24, 1980, at the Barclay Hotel in Philadelphia, Myers and Criden met with two other FBI undercover agents, posing as representatives of the sheiks. These agents were Michael Wald (using the name Michael Cohen) and Ernest Haridopolous (using the name Ernie Poulos). Myers vehemently complained about ending up with only $15,000, after expecting to retain $50,000 for himself out of an anticipated payment of $100,000. As Myers pointed out, "Who am I goin' to complain to . . . my congressman[?]" The undercover agents mollified Myers with an offer to pay an additional $35,000, which Myers said would be agreeable. On February 2, 1980, the date set for the additional payment, Myers was questioned at his home by FBI agents who identified themselves and said they were investigating the activities of Criden, Errichetti, Weinberg, DeVito (Amoroso), and Cohen (Wald). Myers denied knowing Weinberg, DeVito, or Cohen. The same day FBI agents interviewed Johanson. He admitted driving to Kennedy Airport for the August meeting and receiving a stack of cash. He said he realized the seriousness of this type of activity, but could not resist the chance to make easy money.

Claims at the Myers *Trial.* Myers acknowledged at his trial that he had retained $15,000 of the $50,000 handed to him by Amoroso. His defense, also adopted by his three co-defendants, was that all of his statements to Amoroso and Weinberg at the hotel on Long Island and to Wald and Haridopolous at the hotel in Philadelphia were what he termed "playacting." Myers, the only defendant of the four on trial to testify, claimed that Weinberg had told Errichetti, and Errichetti had told Myers, that nothing would ever have to be done for the sheiks in connection with immigration. According to Myers, Errichetti told him just prior to the August 22 meeting what he should say to impress the sheik's representatives. Myers claimed he did not intend to fulfill any of the promises he made at the meeting. Over the Government's objection, Judge Pratt instructed the jury that they should convict the defendants at the *Myers* trial of bribery only if they found that Myers was not "playacting." The jury's verdicts constitute a rejection of Myers' defense.

The Payment to Lederer. The initial contact with Lederer, as with Myers, was made by Johanson. He told Cook that Lederer had been briefed on the sheik's immigration problem, on the sheik's interest in investing in Philadelphia, and on the requirement that the Congressman personally receive the $50,000 being offered. Cook testified that Lederer said he "would gladly do it for Lou [Johanson] and all he wanted was a $5,000 contribution for the spring primary." On September 11, 1979, Lederer and Errichetti met with Amoroso and Weinberg at the Hilton Inn near Kennedy Airport. The meeting was recorded on videotape. Lederer said that Errichetti had briefed him on the sheik's immigration problems. When Amoroso said, "I understand that you can introduce

legislation," Lederer replied, "Right, a bill. Private bill. Sure." Lederer then raised a concern that people might ask, "Why all at once does a Philadelphia Congressman want to help somebody . . . ?" It would be "so much nicer," he continued, if the sheik had a "legitimate interest" in the port of Philadelphia." At the end of the meeting, Amoroso handed Lederer a bag containing $50,000 in $100 bills, commenting, "I hope you don't mind a brown paper bag with this in" and adding, "I hope you spend it well."

The next day Criden met with Cook in Philadelphia and handed him two envelopes. One, marked "RL" (Raymond Lederer), contained $5,000; the other, marked "EC" (Ellis Cook), contained $4,500. Criden told Cook that $20,000 had gone to Errichetti, $5,000 to "Mel and Tony" (Weinberg and Amoroso), and the remaining $15,500 to Criden and Johanson. Later Johanson delivered Lederer's $5,000 share to the Congressman. On February 2, 1980, Lederer was questioned by FBI agents about the September 11, 1979, meeting. He denied that Errichetti was present, that private immigration bills were discussed, and that he had received a package or a brown paper bag.

Claims at the Lederer *Trial.* Lederer acknowledged at his trial that he had been given $5,000 of the $50,000 handed to him by Amoroso. His sole defense was that he had been entrapped and that there was no evidence of his predisposition to commit any offenses. The jury, charged with respect to the entrapment defense, rejected it by their verdicts.

The Payments to Thompson and Murphy. In September, 1979, Criden met Silvestri, the New Jersey businessman, in Florida and, knowing of Silvestri's contacts

among Democratic politicians in New Jersey, inquired about Congressmen who might be willing to meet the sheik's representatives. Silvestri suggested Congressman Thompson. On October 4, Silvestri introduced Criden to Thompson, at which time Criden and Thompson spoke privately. That evening Criden told Weinberg that Thompson had agreed to assist and would meet Weinberg and Amoroso in Washington on October 9. Criden told Cook that he had made arrangements so that Thompson would not personally have to take the "package." Thompson and Criden met with Amoroso and Weinberg on the morning of October 9 at a townhouse on W Street maintained by FBI agents. The meeting was videotaped. The discussion centered on the use of private immigration bills to prevent or at least delay deportation. When Amoroso stated, "That's what the money is for," Thompson replied, "I'm not looking for any money." The discussion of private immigration bills continued. Weinberg said the sheik wanted friends he could depend on, to which Thompson replied, "I don't know how many more ways I could say it." At this time no money was transferred.

Later that day Criden returned to the W Street house for a further discussion with Weinberg and Amoroso. This meeting was videotaped. Criden complained that at the morning session Amoroso had altered their agreement, which, he claimed, called for no mention of money and Criden simply receiving a package. Weinberg and Amoroso denied making such an arrangement, stating that they were willing to have Criden take the package as long as Thompson acknowledged the money. Criden demurred, arguing that Thompson was too experienced and suspicious and could not be expected to act like Myers

and Lederer. Criden agreed to talk with Thompson and telephoned to arrange a meeting with the Congressman.

On the evening of October 9, Thompson and Criden returned to the W Street house and met again with Amoroso. The meeting was videotaped. Criden said, "Frank understands the situation." Amoroso said, "There's the briefcase," pointing to a briefcase containing $50,000 in $100 bills. Thompson said to Criden, "You look after that for me will you?" Thompson and Criden then said they would bring others whom they would carefully screen. Later the group discussed possible investments of the sheik's money in New Jersey. Thompson suggested some possibilities, noting that such investments would put him in a position to justify his support of the sheik. Amoroso, recalling the morning conversation, said that they had then been "shadow boxing," to which Thompson replied, "Well, you have to be careful." Thompson said the first Congressman he might send would be his "pal" from New York, meaning Congressman Murphy. Thompson said he would "brief" his pal beforehand. As the meeting ended, Thompson and Criden both momentarily lifted the handle of the briefcase, and Criden carried it out.

The next morning Criden told Cook in Philadelplhia how the $50,000 was to be divided. Thompson had taken $20,000,[5] Errichetti would receive $10,000, Silvestri, $3,500, "Mel and Tony," $5,000, and $10,000 for Criden, Johanson, and Cook, leaving $1,500 unaccounted for.

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5 At trial the Government contended that its evidence showed that Thompson had received a portion of the money delivered at the October 9 meeting, but his violation of the bribery and unlawful gratuity statutes was based entirely on the claim that he had received a portion of the money delivered to Murphy and Criden at the October 20 meeting.

On October 10, Thompson met with Congressman Murphy in Murphy's office. After Thompson returned from a brief trip, he arranged for Murphy to meet Criden on October 19, and a meeting with the sheik's representatives was arranged for October 20. Murphy and Criden met with Amoroso and Weinberg at the Hilton Inn near Kennedy Airport on October 20. The meeting was videotaped. The discussion centered on the sheik's anticipated immigration problems. Amoroso said that his employers felt it was worth "whatever they have to put out" to obtain assistance. Amoroso explained that his employer had said, "[T]ake the money, go find the people that can, can do this for me." Criden replied, "All you have to do is get a hold of me. I will get a hold of Jack [Murphy]." Later, Weinberg said, commenting on the apparent absence of any problem, "As long as the man says he's going to take care of it. That's what counts." Murphy answered, "Yeah." Weinberg then made clear that it would be a "different deal" if any help was needed for anyone other than the two employers that had been mentioned. "[I]n other words," Amoroso explained, "these, what we're, what we're coming up front with, the money for is just for these two guys." Murphy answered, "Yeah." At the end of the meeting Amoroso picked up a briefcase containing $50,000 in $100 bills. Criden said, "Why don't you give that to Jack." Murphy said, "Howard why don't you take care of that."[6]

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[6] The Government contends that a close listening of the videotape reveals Murphy to have said, "Howard why don't you take care of that for me?" The Government's transcript of the tape, shown to the jury, contained this version. Murphy's transcript, also shown to the jury, omitted the final words "for me." Our listening of the tape did not catch the words "for me," though it was surely proper to permit the jury to decide for themselves. Whether or not Murphy's line ended with "for me," the echo from the Thompson-Criden dialogue of October 9 is unmistakable.

On October 22, Criden, carrying the briefcase containing $50,000, met with Cook in Philadelphia and explained the expected division of the money. $25,000 would be delivered to Thompson, of which Murphy would receive $15,000; Errichetti would receive $10,000, "Mel and Tony," $5,000, and Criden, Johanson, and Cook, the remaining $10,000. Later that day Thompson telephoned Criden and arranged for Criden to meet him at a motel in New Jersey. Upon his return to Philadelphia, Criden told Cook that he had delivered the money to Thompson.

Subsequent events cast further light on the issue, seriously contested at the *Thompson-Murphy* trial, as to whether either Thompson or Murphy had received money at or as a result of the October 20 meeting. On November 8, Thompson gave Criden the name of Congressman John Murtha of the Twelfth District of Pennsylvania as a next "candidate" for the sheik's representatives. Criden passed Murtha's name along to Amoroso and Weinberg later that day at the conclusion of a meeting the three of them had with Laurence Buser, a friend of Murphy's. The purpose of this meeting was to discuss a proposed shipping deal to be financed by the sheiks in which Murphy, according to Buser, would be a "silent partner." Thompson then undertook to recruit Murtha. As Murtha testified at trial, Thompson told him, in a discussion on the floor of the House of Representatives, about the wealthy Arabs who might need assistance on immigration matters. In a second conversation with Murtha on the House floor, Thompson told Murtha that there would be $50,000 in "walking around money" for Congressmen willing to help. Thompson told Murtha he had already enlisted Murphy in the venture. Ultimately, no money was ever paid to Murtha.

On January 10, 1980, Murphy, Buser, and Criden met with Amoroso and Weinberg at the W Street house. The meeting was videotaped. The discussion concerned the proposed shipping deal, as to which Murphy said he was "not in." Later Amoroso spoke privately with Murphy. In this conversation Murphy acknowledged the dangers of speaking about money and then, in the Government's view, engaged in playacting of his own in denying receipt of any money. Murphy told Amoroso, "[A]ny time money's mentioned where a public official is mentioned, there—there's automatically an ability to link 'em to something illegal or to taking a consideration for something, uh, that he's supposed to do or use his office to do and there's, no public official would ever be involved in anything like that. . . . Particularly Thompson, myself, or Murtha. We'd never do anything like that. See?" Amoroso said, "[Y]ou're being coy with me." Murphy said, "Sure." Then when Amoroso said he had been reluctant to give Murphy money, Murphy said, "You didn't, you didn't give me any money. . . . I never, received any money from anyone." The conversation continued with the two discussing future plans for Murphy to meet the sheik. After this meeting Murphy requested a private investigator to check out Weinberg, "DeVito," and Abdul Enterprises. Murphy said he thought they were either phonies or government agents.

On February 2, 1980, FBI agents questioned Thompson about his October 9 meeting with Amoroso and Weinberg. Thompson denied that immigration matters had been discussed and denied that anyone had received a briefcase.

Claims at the Thompson-Murphy *Trial.* At trial Thompson denied receiving any money. He testified that

his sole purpose is going to the meetings with the sheik's representatives and arranging introductions to Murphy and Murtha was to attract investments to his and their districts. He claimed that he thought the briefcase handed to Criden at the October 9 meeting had contained investment proposals. Murphy neither testified nor presented defense witnesses at trial. His defense, as argued in summation, was that he had not received any money.

III.

We turn first to a series of broad claims asserted, with slight variations, by some or all seven of the appellants as grounds for rejecting the lawfulness of their convictions. These are claims that in several distinct, though related, respects these convictions were obtained in violation of an outer limit of fairness guaranteed by the Due Process Clause of the Fifth Amendment to all persons whenever the Government of the United States acts to detect and prosecute criminal activity. Some of the claims are reenforced by the contention that the Abscam investigation and prosecution of Congressmen, and those chaged with aiding and abetting them and conspiring with them, also violated constitutional protections of Members of Congress, either contained explicitly in the Speech or Debate Clause, U.S. Const. art. I, § 6, or implicitly in the doctrine of separation of powers.

A. Lack of Prior Suspicion.

Appellants contend that it is unconstitutional for the Executive Branch of the Government to predicate the conviction of a Member of Congress upon a criminal opportunity created by agents of the Executive Branch, in the absence of probable cause, or perhaps some lesser

standard of suspicion, to believe that the Congressman has previously engaged in criminal activity. The argument emphasizes the risk of abuse: if the practice is permitted, it might be directed at Congressional targets selected for political reasons, and such political targeting, though violating the First Amendment, *see United States v. Steele,* 461 F.2d 1148, 1151 (9th Cir. 1972), would be difficult to establish and therefore too readily available for use by malevolent officials.[7] The argument also suggests that it is simply not the constitutional business of the Executive Branch to test the virtue of Members of a coordinate branch of government.

In *Myers I* we canvassed the considerations supporting and opposing this claim and concluded that while the claim raised important issues of public policy appropriate for the attention of the Executive and Legislative Branches, it did not present a court with a ground for declaring that the Constitution had been violated, 635 F.2d at 938-39. Our reflection upon the issue has been deepened by the passage of time and focused more sharply by the vast record assembled on these appeals, but our conclusion has not been altered. The Constitution permits Congress to apply the criminal law enforcement process to a Member's acceptance of a bribe. *United States v. Brewster,* 408 U.S. 501 (1972). A Congressman is as entitled as any other citizen to the constitutional and statutory protections that limit the power of the Government to investigate and prosecute criminal offenses. But,

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[7] Several appellants in fact contend that in these cases the Government targeted the defendant Congressmen for political or other impermissible reasons. This claim is flatly contradicted by the evidence. The Government had no role whatever in the selection of any of the four Congressmen involved in these appeals. Criden and Johanson selected Congressmen Myers and Lederer. Silvestri selected Congressmen Thompson. Thompson selected Congressman Murphy.

with the exception of section 6 of Article I, which explicitly affords immunity to Senators and Congressmen "for any Speech or Debate in either House" and privilege from arrest for most criminal offenses during attendance at sessions of Congress, the Constitution does not provide Members of the Legislative Branch with any extra protections beyond those guaranteed to all citizens. Specifically, Members of Congress enjoy no special constitutional rule that requires prior suspicion of criminal activity before they may be confronted with a governmentally created opportunity to commit a crime.

What is available in such circumstances is the traditional defense of entrapment, which prevents conviction of a person induced to commit a crime unless the prosecution can establish the person's predisposition to commit the crime. *See Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932). The entrapment defense exonerates a defendant who engages in criminal behavior when the activity of government agents "implant[s] in the mind of an innocent person the disposition to commit the alleged offense and induce[s] its commission," *Sorrells v. United States, supra*, 287 U.S. at 442. But the defense of entrapment is not established simply because government agents "afford opportunities or facilities for the commission of the offense," *Sorrells v. United States, supra*, 287 U.S. at 441, or engage in "deceit." *United States v. Russell*, 411 U.S. 423, 435-36 (1973). The legal defense of entrapment is not established whenever a defendant is caught by a ruse.

Although the defense of entrapment was available to all seven appellants, none except Lederer elected to assert the defense at trial, or request a jury instruction on the issue. The defendants in the *Myers* and *Thompson-Murphy* trials made no attempt to avail themselves of the

limited opportunity a defendant has to defend on the dual grounds of non-involvement and entrapment, *see United States v. Valencia*, 645 F.2d 1158, 1170-72 (2d Cir. 1980) (amended 1981). They claimed only that bribery had not occurred, the *Myers* defendants on the ground that Myers was only "playacting,"—pretending to promise official action—and Thompson and Murphy on the ground that proof was lacking that they had accepted money for promises of official action. We do not doubt that when an entrapment defense is raised by evidence of inducement, either through cross-examination or affirmative evidence, a defendant is entitled to have a court assess, as with every other element of an offense, whether the record contains sufficient evidence from which a reasonable jury can conclude beyond a reasonable doubt, *United States v. Taylor*, 464 F.2d 240, 243 (2d Cir. 1972), that the prosecution has proved the defendant's predisposition to commit the offense. *See United States v. Valencia, supra*, 645 F.2d at 1167-68 (evidence of predisposition sufficient to create issue for jury). But a defendant is not entitled to a court ruling on the minimal sufficiency of the prosecution's evidence as to a defense that the accused has not placed in issue. A defendant's failure to assert an entrapment defense prevents the prosecution from responding to evidence of inducement by presenting evidence of the defendant's predisposition to commit the crime. We hold that a defendant who fails to assert entrapment as a factual defense at his trial, cannot assert it as a legal defense to his conviction. *See United States v. Bishop*, 367 F.2d 806, 809-10 (2d Cir. 1966).

Although Lederer, having asserted the defense of entrapment at trial, can challenge the sufficiency of the evidence of his predisposition, his claim is without merit. In seeking only $5,000 for himself out of the $50,000 he

received, Lederer displayed neither the greed of Myers nor the guile of Thompson and Murphy; nevertheless, the evidence at his trial fully entitled the jury to find his predisposition beyond a reasonable doubt. Predisposition may be established by "the accused's ready response to the inducement," *United States v. Viviano*, 437 F.2d 295, 299 (2d Cir.), *cert. denied*, 402 U.S. 983 (1971); *United States v. Becker*, 62 F.2d 1007, 1008 (2d Cir. 1933). The videotape of the September 11 meeting reveals Lederer responding with alacrity. As he assured the sheik's representatives, "I'm not a Boy Scout."

B. Excessive Government Role.

Appellants contend that even if the traditional entrapment defense fails, whether factually in Lederer's case or procedurally as to the other appellants, the conduct of Abscam violated standards of due process because the Government's role in the investigation was excessive and fundamentally unfair. Unlike the entrapment defense, which focuses on the defendant's predisposition, this due process claim focuses on the conduct of the government agents.[8] There are several strands to the argument. First, it is urged, the Government created the crimes. The elaborate contrivance of Abscam is claimed to extend beyond the legitimate role of law enforcement in detecting crime into a forbidden area of instigating crime.

[8] The appellants sometimes refer to this claim as "entrapment as a matter of law." We prefer to characterize it as a due process claim, leaving the phrase "entrapment as a matter of law" to describe the claim that, with respect to a traditional defense of entrapment, the evidence of predisposition was insufficient as a matter of law to permit the jury to find that the prosecution had proved predisposition as a matter of fact. Unlike the claim of entrapment as a matter of law, the due process claim of excessive governmental inducement is available to a defendant whether or not he asserted an entrapment defense at trial, since this claim is independent of evidence concerning predisposition.

Second, the appellants contend that the inducements offered to the Congressmen for their corrupt promises of official action were so excessive that a court should declare them to exceed limits claimed to inhere in the Due Process Clause. Third, appellants in the *Myers* case contend that the Government agents, notably Weinberg, "coached" Congressman Myers into committing the crimes by having Errichetti and Criden tell Myers what to say at the videotaped meetings and simultaneously assuring him that he need not intend to keep the promises he was making since he would never be called upon to deliver.

In assessing this collection of claims, we acknowledge the intimations in decisions of the Supreme Court and this Court that the due process requirement of fundamental fairness may have a special pertinence when Government creates opportunities for criminal conduct in order to apprehend those willing to commit crimes. *See Hampton v. United States,* 425 U.S. 484, 491-95 (1976) (Powell, J., concurring); *United States v. Russell, supra,* 411 U.S. at 431-32; *United States v. Archer,* 486 F.2d 670, 676-77 (2d Cir. 1973); *see also Archer v. Commissioner of Corrections,* 646 F.2d 44, 46-47 (2d Cir.), *cert. denied,* 102 S. Ct. 291 (1981) (*Archer II*). At the same time, we recognize that, with the exception of a decision by a divided panel of the Third Circuit, *United States v. Twigg,* 588 F.2d 373 (3d Cir. 1978), convictions have not been invalidated by federal appellate courts on grounds of excessive government involvement after the decisions of the Supreme Court in *Russell* and *Hampton* narrowed the availability of this defense. As the decisive concurring opinion of Justice Powell in *Hampton* stated, "Police overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction." 425

U.S. at 495 n.7. Our own decision in *Archer II*, though questioning an extreme example of governmental initiation of a criminal opportunity, if not the crime itself, rejected the due process claim. 646 F.2d at 47. Moreover, as we recently observed in *United States v. Alexandro*, 675 F.2d 34 (2d Cir. 1982), an Abscam conviction of an employee of the Immigration and Naturalization Service, the due process claim, in the rare instances when successful, has prevailed to restrain law enforcement activities that involve coercion, *e.g.*, *Watts v. Indiana*, 338 U.S. 49 (1949), or outrageous violation of physical integrity, *e.g.*, *Rochin v. California*, 342 U.S. 165 (1952).

1. *Instigation.* The appellants' claim of excessive governmental involvement in the instigation of criminal conduct is not supported by the facts. Though the "sting" was surely elaborate, its essential characteristic was the creation of an opportunity for the commission of crime by those willing to do so. The Government produced people with fictitious identities ready to pay bribes to Congressmen. Word of the availability of bribe money was made known. From that point on, the essential conduct of the agents and their paid informant was to see who showed up to take the bribes and videotape them in the act of doing so.[9] Whatever may be the due process limit of governmental participation in crime, it was not reached here. *See Hampton v. United States, supra; United States v. Russell, supra; United States v. Jannotti*, 673 F.2d 578 (3d Cir.) (*en banc*), *cert. denied*, 50 U.S.L.W. 3963 (U.S. June 7, 1982); *United States v.*

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[9] As Judge Pratt pointed out, Murphy's conduct is more accurately described as the taking of money, rather than a bribe, since the jury acquitted him of the bribery offense and convicted him of accepting an unlawful gratuity. 527 F. Supp. at 1225 n.14.

McQuin, 612 F.2d 1193, 1196 (9th Cir.), *cert. denied*, 445 U.S. 954 (1980); *United States v. Quintana*, 508 F.2d 867, 876-78 (7th Cir. 1975).

2. *Inducement.* Appellants contend that the size of the inducements offered to the Congressmen were excessive. They refer not to the $50,000 amounts of the bribes, but to the offers of financing multi-million dollar projects in the Congressmen's districts. We have considerable difficulty with the premise of this argument, which is that a Congressman is privileged to take a $50,000 bribe so long as he simultaneously believes he is bringing the benefits of investments to his district. The argument is an affront to all the law-abiding Members of Congress and state officials who consider it a normal part of their public responsibilities to promote business activity for the benefit of their constituents. Moreover, if appellants are contending that there are due process limits on the size of an inducement that a government agency may offer and condition on acceptance of a bribe, the facts of these cases belie the fanciful image of four Congressmen so anxious to bring investment benefits to their districts that they reluctantly accept bribes on which they thought the investments were conditioned. Quite to the contrary, the evidence shows four Congressmen jumping at the chance to take a bribe and discussing investments in their districts as a convenient cover to justify their rendering of purchased legislative services. As Thompson said, anticipating possible criticism for helping the sheik, "I'm in a position to say well of course I'm helping this guy. Why shouldn't I help this guy . . . his money is helping my guys work everyday." Myers put it more bluntly: an investment in the district "gives me a little protection."

Thompson contends that inducement in violation of due process limits occurred in his case because the agents

persisted in offering money after his initial rejection on the morning of October 9, 1979. The claim is spurious. At the morning meeting Thompson did not reject a bribe, he rejected its payment under circumstances he feared would be incriminating. Then in the afternoon Criden met first with Amoroso and Weinberg and later with Thompson. At the meeting on the evening of October 9, what occurred was not unfair inducement, but simply the offering of money pursuant to an arrangement developed by Thompson and Criden whereby the bribe could be accepted while preserving what Thompson mistakenly thought would be deniability.

3. *"Coaching."* Appellants in the *Myers* case claim that excessive governmental activity, breaching due process limits, is to be found in the alleged conduct of Weinberg in "coaching" Myers to say falsely that he would introduce private immigration bills while assuring him that he would not be called upon to deliver on his promises. The claim is that Weinberg gave Errichetti and Criden the script for a charade that Myers would enact before the television cameras, and Errichetti and Criden then instructed Myers, in effect, how to obtain money under false pretenses.

In the District Court, Judge Pratt accepted, for purposes of these trials, the legal sufficiency of the "playacting" defense,[10] and afforded the defendants in the *Myers* case wide latitude to present evidence in support of their claim. He then submitted the claim to the jury, under an instruction that the jury was not to convict unless the

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10 We suspect that this ruling reflects the not uncommon practice of district judges, faced with a defense claim of unquestionable legal validity in the course of protracted proceedings, to err on the side of caution and permit the defense to make its factual claim to a jury, rather than risk a reversal and retrial.

Government proved beyond a reasonable doubt that a Congressman who had accepted money in return for a promise to introduce immigration bills had done so with the intention of carrying out that promise. In other words, the jury was to acquit on the bribery charge if they accepted the "playacting" defense. The *Myers* jury obviously rejected the defense, and, on the evidence before them, they were certainly entitled to do so. Despite the existence of some evidence that Weinberg, through Errichetti and Criden, had encouraged the Congressmen to "come on strong," as Weinberg acknowledged in his testimony at the *Myers* trial, the jury was entitled to conclude that this was no charade. An entirely plausible inference even from the defendants' evidence, and the one the jury apparently accepted, is that Weinberg was not urging the Congressmen to utter promises they were reluctant to make and did not intend to keep, but was simply anxious to make sure that they fully and unambiguously expressed on videotape the promises they were all too ready to make and fully intended to keep.

Moreover, after the trials were concluded, Judge Pratt afforded the defendants a full opportunity at the "due process" hearing to amplify the record to persuade him, as the trier of fact on the due process claim, that only a charade had occurred. After conducting a wide-ranging hearing, the District Judge found the claim unsupported as a factual matter, and his findings are not clearly erroneous.

However, circumstances in the record prompt us not to place this portion of our decision solely on the traditional deference an appellate court extends to the fact-finding of a jury and a trial judge when supported by sufficient evidence. The record contains one striking instance, in the early stages of Abscam, when Weinberg unquestionably

pursued a course of conduct with Senator Williams that reveals precisely the sort of "coaching" for "playacting" that some of these appellants claim occurred with them.[11] In a videotaped conversation with Senator Williams on June 29, 1979, Weinberg made these statements:

> He's only interested in you. You gotta tell him how important you are, who you are, what you can do and you tell him in no uncertain terms "without me there is no deal." "I'm the man. I'm the man who's gonna open the doors. I'm the man who' gonna do this and use my influence and I guarantee this." Follow me? All bullshit.
>
> . . . .
>
> And that's it, it goes no further, it's all talk, all bullshit. That's all he wants to hear it.
>
> . . . .
>
> It's . . . it's a walk-through. You should be out of there in twenty minutes.
>
> . . . .
>
> Come on, "Me, I'm the power." And that's it. It's as simple as that. You're on stage for twenty minutes.
>
> . . . .
>
> So you ready to go on-stage?

When this "coaching" session came to the attention of the office of the United States Attorney for the District of New Jersey, prosecutors there strenuously protested Weinberg's conduct and complained to Department of Justice officials and the prosecutors in charge of Abscam in the Eastern District of New York. That protest led to a meeting on August 9, 1979, at the home of Special Agent

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[11] We intimate no opinion with respect to the effect of this episode on Senator Williams' appeal from his conviction.

Larry Schneider of the FBI office in New Jersey, attended by Weinberg, prosecutors from the Eastern District of New York and the District of New Jersey, and FBI agents. What was said at that meeting was a matter of dispute at the due process hearing before Judge Pratt. FBI agent Martin Houlihan recounted an exchange between Edward Plaza, then an Assistant United States Attorney in New Jersey,[12] and Weinberg. According to Houlihan, Plaza told Weinberg that he could not put words into people's mouths; Weinberg replied "to the effect that if he didn't say things like that, then we wouldn't be making any cases." Agent Schneider supported Houlihan's account with the following testimony: at a meeting a few days later with Thomas P. Puccio, attorney in charge of the Organized Crime Strike Force in the Eastern District, Weinberg denied ever saying that he had "to put words in people's mouths or we won't make any cases," to which Schneider and Houlihan promptly replied, in substance, "Mel, that's not so, you did say that."

Schneider also testified that, when the Williams' "coaching" session was discussed at the August 9 meeting and Weinberg was admonished to refrain from such conduct, he (Schneider) made "a statement to the effect 'Yeah, at least if you're going to coach him you don't tape it.' " At the hearing, Schneider characterized this as a "joking remark," which "was said in a joking matter, as far as I understood everybody understood it to be a

12 Judge Pratt concluded that both Plaza and another Assistant United States Attorney from New Jersey, Edward Weir, were motivated to criticize the Abscam operation by jealousy over the control by prosecutors from the Eastern District of New York of an investigation uncovering corruption in the District of New Jersey. 527 F. Supp. at 1245-47. Professional rivalry may have been afoot, but our review of the record inclines us to think that Plaza and Weir were expressing in good faith concerns based largely on their sense of the proper administration of justice.

joking matter." To put it mildly, this is an odd subject for humorous bantering.

Not having heard the participants who testified about the August 9 meeting, we are in no position to assess credibility and decide whether Weinberg made the remark attributed to him. We note that Judge Pratt's discussion of the August 9 meeting does not make a finding of fact on this point. 527 F. Supp. at 1235. Judge Pratt did find that, by the time of the August 9 meeting, the Williams "coaching" incident was "past history, and the technique was not thereafter repeated." *Id.* This finding relates to whether Weinberg himself did any "coaching" of the Congressmen. It does not preclude the distinct possibility that Weinberg encouraged Errichetti and Criden to handle the "coaching" for him. Judge Pratt expressed the view that, if this happened, the Government bore no responsibility for whatever Errichetti and Criden might have told the Congressmen. *Id.* at 1735-37. If impropriety of constitutional dimension had arisen from Weinberg's "coaching," we would not be so certain as Judge Pratt that the taint would be dissipated by transmission through middlemen. *See United States v. Valencia, supra,* 645 F.2d at 1168-72); Note, *Entrapment Through Unsuspecting Middlemen,* 95 Harv. L. Rev. 1122 (1982).[13] There is a

[13] Although there is room for fair dispute as to the circumstances in which government may be held responsible for extrapment by a third party, *see United States v. Valencia,* 645 F.2d 1158, 1176 (2d Cir. 1981) (Van Graafeiland, J., dissenting from denial of rehearing en banc), "the defense is available, of course, where government agents act through private citizens," *United States v. Buie,* 407 F.2d 905, 908 (2d Cir.), *aff'd on other grounds sub nom. Minor v. United States,* 396 U.S. 87 (1969); *see Lopez v. United States,* 373 U.S. 427 (1963); *Johnson v. United States,* 317 F.2d 127, 128 (D.C. Cir. 1963). Appellants' claim of indirect "coaching" presents the strongest circumstance for attributing third party conduct to a government agent, since this is a claim of what might be called "instructed transmission" of an inducement: Weinberg, acting as agent for the Government, allegedly

substantial risk that Weinberg, having been admonished for "coaching" Senator Williams, and, even on the Government's version, having heard FBI agents and prosecutors "joke" about his not taping further "coaching" sessions, did decide to encourage Errichetti and Criden to undertake similar "coaching" ventures with the Congressmen.[14] Since we are left with at least a measure of unease as to whether some indirect "coaching" occurred, we prefer to consider the substance of appellants' claim.

(3)a. *"Coaching" and the "Playacting" Defense.* The appellants' "coaching" claim seeks to create a due process violation by combining an erroneous interpretation of the bribery statute with an unrealistic assessment of the facts. The first step in the argument is taken when the appellants contend that "playacting" is a defense to bribery. It is not.[15] Since Myers appears to be the first public official

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gave "coaching" directions to middlemen Errichetti and Criden with specific instructions that they should relay his directions to the Congressmen. The justification for holding government accountable for a middleman's behavior would be less compelling if the claim were one of "uninstructed transmission": a middleman takes it upon himself to pass an agent's inducement along to others. Government responsibility has been rejected where the circumstances showed what might be called "caused" inducement: an agent induces a middleman to commit a crime, and the middleman, responding to the pressure upon him, takes it upon himself to induce another person to participate in the crime. *E.g., United States v. Reed*, 526 F.2d 740 (2d Cir. 1975), *cert. denied*, 424 U.S. 956 (1976). *See generally United States v. Valencia*, *supra*, 645 F.2d at 1178 (explication of *Reed* facts).

14 At the Philadelphia due process hearing before Judge Fullam, Errichetti and Criden, testifying under an arrangement that precluded use of their testimony against them, both alleged that, acting at Weinberg's behest, they had told the Congressmen that money could be obtained simply by pretending to give assurances of using Congressional influence.

15 Appellants have no basis for complaint because Judge Pratt gave them an opportunity, accepted by defendants in the *Myers* trial, to try to persuade the jury that the facts supported a defense to which they were not entitled.

in a reported federal decision to defend a bribery charge on the ground that he intended to keep the bribe but not to keep the promise he made to the bribe-payer,[16] it is not surprising that the appellate reports have not dealt explicitly with the claim. The statute proscribes the corrupt receipt of money by a public official "in return for: (1) being influenced in his performance of any official act. . . ." The phrase "in return for" appeared in the statute in 1962 when Congress revised and consolidated various public corruption statutes. This phrase makes it clear that bribery under section 201(c) requires a promise of a future act in exchange for the money given to the public official, an element not required for receipt of an unlawful gratuity under section 201(g), which punishes receipt of a gratuity paid "for or because of" performance of a future or past official act. *United States v. Niederberger,* 580 F.2d 63, 68-69 (3d Cir.), *cert. denied,* 439 U.S. 980 (1978); *United States v. Brewster,* 506 F.2d 62, 71-72 (D.C. Cir. 1974). As the Supreme Court said in *United States v. Brewster, supra,* 408 U.S. at 526, construing the bribery statute, "[t]he illegal conduct is taking or agreeing to take money for a promise to act in a certain way." But the text of the 1962 revision perpetuates the preexisting ambiguity as to whether the promise given by the public official must be one that he intends to carry out. A prior statute, 18 U.S.C. § 205 (1958), had required that a Congressman receive the bribe "with the intent to

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16 Cases have considered and rejected the somewhat similar defense that the bribe-taker was unable to be influenced because the official act for which the bribe was paid either was beyond his authority, *see, e.g., United States v. Carson,* 464 F.2d 424, 433 (2d Cir.), *cert. denied,* 409 U.S. 949 (1972); *United States v. Heffler,* 402 F.2d 924 (3d Cir. 1968); *cert. denied,* 394 U.S. 946 (1969), or had already been taken, *see, e.g., United States v. Arroyo,* 581 F.2d 649, 653-57 (7th Cir. 1978), *cert. denied,* 439 U.S. 1069 (1979).

have his action . . . influenced." This somewhat awkward phrasing left it unclear whether the Congressman must intend to take action or need only intend to receive money with awareness of the purpose for which the briber gives it.

The present version, as revised in 1962, deletes "intent" from the description of the conduct specifically proscribed, and instead requires that the overall offense be committed "corruptly." The specific conduct is rephrased as receipt of money in return for "being influenced" in official actions. The meaning of the new language (and probably that of the prior language as well) is clarified by the report of the House Committee on the Judiciary:

> The language used in subsection (c) [of section 201] emphasizes that it is the purpose for which the recipient knows the bribe is offered or given when he solicits, receives, or agrees to receive it which is determinative of criminality. Some courts have given this intepretation to the present section 202.[17] (See, e.g., *Woelfel v. United States,* 237 F.2d 484, 488; *Whitney v. United States,* 99 F.2d 327, 331.)

H.R. Rep. No. 748, 87th Cong., 1st Sess. 18 (1961). Thus, "being influenced" does not describe the Congressman's true intent, it describes the intention he conveys to the briber in exchange for the bribe. The citation in the House Report to the *Whitney* decision underscores the point. On the page of the *Federal Reporter* to which the

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[17] Section 202 of Title 18, as it read before the 1962 revision, proscribed acceptance of bribes by various officials of the United States. Using language similar to former section 205, covering receipt of bribes by Members of Congress, section 202 proscribed receipt "with intent to have his decision or action . . . influenced thereby." 18 U.S.C. § 202 (1958).

Report refers appear these sentences (and no others of consequence):

> The evidence shows that [the public official] not only took but solicited money in connection with said sales, and whether his action was influenced is immaterial. The money was solicited and taken for the purpose of causing [the people who paid the bribe] to believe that they would get more consideration than they would otherwise.

Whitney v. United States, 99 F.2d 327, 331 (10th Cir. 1938). As the Seventh Circuit has said, in rejecting a claim that a bribe was not received in return for being influenced because the event requiring influence had already occurred, "The phrase ['in return for'] brings into play the purpose of the bribe and thus the mind of the bribe-payer." *United States v. Arroyo*, 581 F.2d 649, 654 (7th Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979). Construing a similar statute proscribing receipt of money for the promise of a public office, 18 U.S.C. § 215 (1952) (a predecessor of 18 U.S.C. § 201 (1976)), the Supreme Court upheld a conviction despite the fact that the public office, though authorized, was not in existence. *United States v. Hood*, 343 U.S. 148 (1952). "Whether the corrupt transaction would or could ever be performed is immaterial. We find no basis for allowing a breach of warranty to be a defense to corruption." *Id.* at 151. With respect to the bribery statute, we believe the defense of fraud is equally unavailable.[18] If Myers was "playacting"

[18] This construction of the statute is especially appropriate when the public officials who receive bribes are Members of Congress, since the Speech or Debate Clause bars evidence of their subsequent official action or the reasons for it, *United States v. Johnson*, 383 U.S. 169 (1966), evidence that would frequently be highly probative of whether, at the time of the bribe, the Member intended to take official action. It

and giving false promises of assistance to people he believed were offering him money to influence his official actions, he violated the bribery statute.[19]

3(b). *"Coaching" as Inducement.* With the statute thus understood, the "coaching" claim does not provide a legal defense simply because some "coaching" may have occurred; the claim would have merit only if there were insufficient evidence of the defendants' predisposition to "playact" or if the agents' conduct were so extreme as to exceed due process limits. We have already ruled that the entrapment defense is without merit in Lederer's case and is procedurally unavailable to the other appellants because they elected not to assert it at trial. The entrapment defense fares no better when the appellants shift their focus from the size of the inducements to Weinberg's alleged suggestion of a script. Prompt acquiescence shows predisposition to accept a bribe, whether or not a promise of official action is intended to be kept.

Thus, appellants are left with a claim that the "coaching" was so outrageously coercive as to violate due process, wholly apart from the traditional defense of entrapment. The record does not remotely support the

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is unlikely that Congress, aware of the special protection its Members enjoy under the Speech or Debate Clause, included in the offense of bribery an element for which the Clause insulates the pertinent evidence.

19 We recognize that some opinions have described the bribery statute in language that can be read to suggest that the bribe-taker must intend to take the promised official action. *See United States v. Brewster,* 506 F.2d 62, 70-76 (D.C. Cir. 1974); *United States v. Irwin,* 354 F.2d 192, 195-96 (2d Cir. 1965), *cert. denied,* 383 U.S. 967 (1966). We do not give controlling weight to such dicta, since they were expressed without any need to consider the bizarre defense that the bribe-taker did not intend to keep his corrupt promise. Consequently, the opinions had no occasion to discuss the 1962 House Judiciary Committee Report, which is so pertinent to the claim in this case.

claim. Even if all of the appellants' evidence is credited, a generous assumption that strains credulity, it shows at most that Errichetti and Criden, perhaps prompted by Weinberg, laid out before each Congressman a scheme for pocketing $50,000 by falsely promising to introduce private immigration bills. Suggesting how easy it is to commit a crime hardly establishes a due process violation. The "coaching," if it occurred, barely qualifies as any inducement at all; if the script was supplied, no one was coerced into playing his part. Due process challenges to an undercover agent's encouragement have been rejected when one defendant was solicited twenty times before committing an offense, *United States v. Esquer-Gamez*, 550 F.2d 1231 (9th Cir. 1977), and when another defendant was tempted by a million-dollar cash deal and prodded by veiled threats, *United States v. Reynoso-Ulloa*, 548 F.2d 1329 (9th Cir. 1977), *cert. denied*, 436 U.S. 926 (1978). Whatever conduct might transgress the standard outlined in *Hampton* and *Russell*, the facts of the Abscam investigation are not even close to the line. *United States v. Alexandro, supra; United States v. Jannotti, supra.* The bare suggestion to a Congressman that he take a bribe, even for a promise he need only pretend to make, surely does not violate a constitutional standard of "outrageous" behavior. The public has the right to expect that their public officials have sufficient integrity not to capitulate at such a suggestion. Whatever the public's expectation, the record reveals that these Congressmen were not children of Hamelin, seduced by the piping of Melvin Weinberg.

C. Impairment of Accurate Fact-Finding.

Appellants allege that the conduct of the Abscam investigation denied them due process for a variety of

reasons that are combined in support of a broad claim that the Government prevented the presentation to the jury of an accurate account of the events. With the exception of traditional arguments that exculpatory evidence was withheld in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), the due process foundation of this general area of attack is more the product of resourceful argument than precedent. To be successful, this attack must overcome our well-established reluctance to dismiss criminal prosecutions because of faulty Government investigation. *See United States v. Brown*, 602 F.2d 1073 (2d Cir.), *cert. denied*, 444 U.S. 952 (1979); cases cited *id.* at 1076-77. It might be thought that the specific constitutional guarantees concerning criminal procedure, *e.g.*, the Confrontation Clause of the Sixth Amendment, and the Federal Rules of Evidence provide sufficient standards for determining the quality of evidence appropriate to support a finding of guilt. Yet the Due Process Clause, with its principle of constitutionally required fairness, has been applied to develop minimum standards concerning the accuracy of evidence, notably in the area of eyewitness identification testimony. *See Manson v. Braithwaite*, 432 U.S. 98 (1977); *Stovall v. Denno*, 388 U.S. 293 (1967). Appellants invite us to frame comparable standards for undercover investigations.

1. *Deliberate Ambiguity.* An interesting component of the argument, advanced by Thompson and Murphy, maintains that when the Government is in control of an undercover operation, as contrasted with merely observing events in which no governmental agent is involved, due process requires the investigators to eliminate or at least minimize ambiguities in the critical events that form the basis of the criminal offense. Otherwise, they contend, the Government needlessly creates risk of erroneous

fact-finding by the jury on the ultimate issue of guilt or innocence. Relating the claim to these cases, they argue that an undercover offer of a bribe must be expressed in terms that leave no uncertainty that money is being transferred to a Congressman and that it is being paid to influence his official actions. As counsel for Murphy contends, "Congressman Murphy was denied the opportunity to say 'no,' [*see Myers I, supra,* 635 F.2d at 939] because the Government did not clearly convey its invitation to corruption." (Murphy Br. 50.)

Perhaps at some point deliberate governmental efforts to render ambiguous events over which agents can exercise considerable control would transgress due process limits of fundamental fairness. Wherever those limits might be, they have not been crossed in these cases. Undercover agents offering bribes to Congressmen are entitled to simulate the guarded conversation that would be expected of those proposing an unlawful venture. *Cf. United States v. Reynoso-Ulloa, supra,* 548 F.2d at 1338-39. They need not say, "Congressman, I have here a cash bribe to be exchanged for your corrupt promise to be influenced in your official action."

In the *Myers* and *Lederer* cases, the bribe offers created no risk of ambiguity. There were ample references to money and to its payment in exchange for assistance with private immigration bills, and both Myers and Lederer directly received envelopes filled with cash under circumstances leaving no doubt as to their knowledge of the contents. The episodes involving payments to Thompson on October 9 and to Murphy on October 20 are somewhat more ambiguous. Although the events and conversations at those meetings are captured on videotape, the sights and sounds, considered in isolation, create fair questions of fact as to whether Thompson and Murphy knew that

money was in the briefcase, and whether the money was received by the Congressmen. Both Congressmen contend that they did not know that the briefcase contained cash and that on both occasions Criden received the briefcase and did not share its contents with either Thompson or Murphy.

Whatever ambiguity arises from the manner in which the bribes were offered at the meetings on the evening of October 9 and on October 20 is directly attributable to the cautious ground rules insisted upon by Criden and Thompson in the hope of insulating Thompson and those he recruited from culpability. It is plainly inferable from the taped conversations of the three meetings on October 9 that Thompson arranged to have the cash transferred without explicit references to it, apparently in the forlorn hope that if any of his trusted companions ever appeared on a witness stand to accuse him, he could escape conviction by recounting how he had told the group that he did not want cash and had left the meeting without any money. The permissible, if not the irresistible, inference the jury could draw from the series of conversations on October 9 was that Thompson was not rejecting money; he was carefully orchestrating how to accept it with feigned innocence. The evidence supported a finding that Thompson and Criden, recognizing that those offering bribes understandably want some indication that the Congressman they have bought is aware of the purchase, worked out a scenario whereby Thompson would acknowledge receipt with only the oblique comment to Criden, "You look after that for me will you?" That formula, the jury could find, would surely satisfy the bribe-givers that Thompson was acknowledging receipt, while preserving his opportunity, if the occasion ever

arose, to claim at a trial, as he did, that he thought the briefcase contained investment proposals.

The transaction on October 20, which formed the basis for the substantive offenses of which both Thompson and Murphy were convicted, followed the same pattern Criden and Thompson had developed and used for the evening session on October 9. The evidence shows that Thompson and Criden had explained their ground rules to Murphy. A recorded telephone conversation between Criden and Weinberg on October 17 contained these passages:

> Weinberg: Now, you gonna lay those ground rules to Murph, right?
>
> Criden: Oh yeah. No problem.
>
> . . . .
>
> Criden: I am going to have lunch with this guy, with Murphy. And I am gonna make sure he understands clearly. . . .
>
> . . . .
>
> Criden: I've got to coach these guys. I've got to make them feel at ease.
>
> . . . .
>
> Criden: I gotta stroke him, you know, uh, make him feel comfortable.
>
> Weinberg: They all got that problem, they're nervous.
>
> Criden: They're all nervous. You know, they all figure that maybe it's a set up, you know.
>
> . . . .
>
> Weinberg: Thompson must have spoken to him, huh.
>
> Criden: Yeah, naturally.

The caution displayed by Thompson and Murphy permitted them a chance to confront the jury with a contestable question of fact. The jury, asked to determine the factual question of whether Thompson and Murphy knowingly took money while seeking to minimize the incriminating nature of their own words and conduct, saw through the ploy. Facing the legal issue of whether the investigators' bribe offer was unfairly obscured, we are equally unmoved. The agents did not violate due process limits by observing the defendants' ground rules.

Murphy further contends that there is a First Amendment dimension to the due process claim of deliberate creation of ambiguous facts. The ambiguities of what occurred on October 20, he suggests, blur the line that must be maintained between unlawful conduct that violates criminal statutes and lawful conduct, protected by the First Amendment, that occurs when a Congressman discusses legislative action and assistance with his constituents. Reliance is placed on cases such as *United States v. O'Brien*, 391 U.S. 367 (1968), and *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969).

This First Amendment claim is untenable. Unlike *O'Brien*, there is no issue in these appeals whether conduct arguably protected by the First Amendment as expression is nonetheless being punished. "[I]t is *taking* the bribe [or an unlawful gratuity], not performance of the illicit compact, that is a criminal act." *United States v. Brewster, supra*, 408 U.S. at 526 (emphasis original). Nor do these appeals present the issue, illustrated by *Spock*, whether a lawful objective was pursued by lawful or unlawful means. *See United States v. Spock, supra*, 416 F.2d at 169. In some circumstances a prosecution of a Congressman for bribery can present a close question as to whether money was received as an illegal bribe or a

lawful campaign contribution; in such cases, the jury must be carefully instructed as to the distinction, and the evidence must show "specific knowledge of a definite official act" for which payment is made. *United States v. Brewster, supra,* 506 F.2d at 81. But none of these Congressmen claimed that he had received what he thought was a campaign contribution.[20] Murphy's point is that, at least in his case, there was an undue risk that the jury might convict him simply for engaging in the normal congressional activities of meeting with people who might invest in his district and advising people on immigration matters. That risk was adequately met by Judge Pratt's instructions, which focused the jury's attention squarely on whether Murphy knew that there was money inside the briefcase transferred on October 20 and whether Murphy received that money. The First Amendment claim cannot obscure the fact that Murphy accepted Thompson's invitation to accept money unlawfully under an arrangement that they both mistakenly believed would yield insufficient evidence of their guilt. The risk of a mistaken conviction is adequately protected by scrutizing the sufficiency of the evidence on which a jury is permitted to find guilt beyond a reasonable doubt.

2. *Conduct of the Investigation.* Appellants' remaining challenges to the accuracy of the Government's proof require little discussion. They voice a chorus of indignation that the Government would employ the services of such an untrustworthy person as Weinberg, and they fault the FBI agents and prosecutors for not subjecting Wein-

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20 Though Lederer was quoted by Cook as saying he would be satisfied with only a $5,000 campaign contribution from his lawyer friends out of the $50,000 payment, he made no claim at trial that he thought the sheik's representatives were making a donation to his campaign. His sole defense was entrapment.

berg to more exacting supervision and for compensating him too generously. They challenge Weinberg's failure to record all of his conversations with all of the defendants and his loss and erasure of some audio tapes. They urge that in various respects the entire investigation failed to conform to internal guidelines of the Department of Justice promulgated by former Attorney General Edward Levi.

The use of dishonest and deceitful informants like Weinberg creates risks to which the attention of juries must be forcefully called, but the Due Process Clause does not forbid their employment, detail their supervision, nor specify their compensation. Weinberg's rewards, both in cash and in lenient treatment for his 1977 fraud conviction, were fully explored with the jury. Though the appellants claimed that he was induced to lie by offers of contingent payments for making cases, the District Court found no such arrangement. 527 F. Supp. at 1240. No doubt Weinberg did not record every conversation with every defendant, but hundreds of audiotapes were made, in addition to the videotaping of all the meetings with the Congressmen. Despite the appellants' dark insinuations, the evidence fully justified Judge Pratt's findings that on one occasion a few audiotapes were stolen from Weinberg's flight bag and on other occasions, Weinberg recorded over and thereby erased previously taped conversations that were unimportant. *Id.* at 1231. There was conflicting evidence, considered by the jury, as to whether on another occasion a tape gap was the result of accident, as Weinberg claimed, or deliberate manipulation, as a defense witness claimed. In no instance can defendants point to any unrecorded conversation or portion of a conversation that would have added anything of significance to their defenses. Non-compliance with internal

departmental guidelines is not a ground for complaint. *United States v. Caceres*, 440 U.S. 741 (1979).

3. *Brady Claims.* Appellants contend that various items were not disclosed to them until after the completion of the jury trials, items that they claim were exculpatory and required to be disclosed under the rule of *Brady v. Maryland, supra.* Many of the claims concern items that would allegedly have bolstered the attack upon the credibility of Weinberg. Judge Pratt properly placed these claims in perspective when he noted the abundant grounds available to the defendants at trial to impeach Weinberg's credibility:

> Weinberg admitted that he had been a criminal most of his life, that he had made his living by being a con man, that he had lied and cheated and violated the law from his early teenage years, that he was a convicted felon, that he had made a deal with the government to cooperate in return for probation on his felony conviction in Pittsburgh, and that he had received substantial compensation for his cooperation in the Abscam investigation and trials.

527 F. Supp. at 1248.

In any event, the claims are without merit. Criden points to evidence he contends would have buttressed his claim that Weinberg had received and had falsely denied receiving a $350 microwave oven and other gifts from Errichetti. The prosecution had sought to support Weinberg's credibility with evidence that he had promptly turned over to FBI agents three $6,000 gold watches given him by George Katz, a defendant in another Abscam case. At the *Myers* trial, Weinberg testified that he told the agents about the watches after he received them. What Criden now complains of is the late disclosure of a

memorandum indicating that Weinberg had told the agents about the watches even prior to his receipt of them. Whenever he mentioned them, the Government's point remains that Weinberg was not likely to conceal a $350 gift when he had been forthcoming about an $18,000 gift. Lederer complains that not until after his trial did he obtain the transcript of the August 9, 1979, "coaching" session involving Weinberg and Senator Williams and other documents revealing criticism by the New Jersey prosecutors of Weinberg's tactics. In fact, Lederer did receive, prior to trial, a lengthy memorandum in which a senior Department of Justice official summarized the criticism from the New Jersey prosecutors and much of the basis for their criticism. Armed with this memorandum, Lederer called two New Jersey prosecutors as defense witnesses to testify about the August 9 session. Moreover, Lederer's defense was entrapment, not "play-acting." Thompson claims he could have bolstered his attack on Weinberg's credibility if he had been given Weinberg's testimony at the "due process" hearing in Philadelphia before Judge Fullam, in which Weinberg falsely denied having been cautioned, after the August 9 session, not to coach potential defendants. The falsity of this denial was not relevant to any testimony Weinberg gave at Thompson's trial. Thompson made no claim that he had been "coached" into making false promises to help the sheik. Moreover, like all the defendants, he had abundant grounds on which to attack Weinberg's credibility. None of these claims, nor any of the other alleged *Brady* violations, which we do not detail, remotely provides a basis for any relief.

* * * * *

Having considered all of appellants' claims that the investigation violated the standards of the Due Process

Clause, we conclude that the conduct of the Abscam operation did not deny any appellant a constitutionally protected right.[21] Appellants contend, nevertheless, that we should assess the conduct of the government agents under more exacting standards than those of the Due Process Clause and dismiss the indictments in the exercise of our supervisory power over the administration of criminal justice. Whatever the scope of that authority in the aftermath of *United States v. Paynor*, 447 U.S. 727 (1980), it does not permit courts to fashion their own "sub-constitutional" limitations on the conduct of law enforcement agents. Prior to *Paynor*, the supervisory power was used to fashion and enforce rules for judicial proceedings in order to safeguard important constitutional rights. *See, e.g., United States v. Mohabir*, 624 F.2d 1140, 1151-53 (2d Cir. 1980) (right to counsel); *United States v. Hinton*, 543 F.2d 1002, 1010 (2d Cir.) (self-incrimination), *cert. denied*, 429 U.S. 980 (1976). And, on infrequent occasions, the power was used to discipline prosecutorial irregularities, particularly in front of grand juries. *See United States v. Jacobs*, 531 F.2d 87 (2d Cir.),

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21 Some of the appellants contend that venue was improperly laid in the Eastern District of New York. They acknowledge that significant events occurred in that District, notably the payments to Myers, Lederer, and Murphy, the last of which was shared with Thompson. The claim is that venue was "manufactured" in the Eastern District for ulterior reasons, primarily to enable the Eastern District prosecutors to handle the trials. In *United States v. Archer*, 486 F.2d 670 (1973), we rejected the Government's attempt to create federal jurisdiction by luring a defendant into placing a telephone call across a state line. We do not preclude the possibility of similar concerns if a case should arise in which key events occur in one district, but the prosecution, preferring trial elsewhere, lures a defendant to a distant district for some minor event simply to establish venue. Here, the key events occurred in the Eastern District of New York, and the Government cannot be faulted for selecting hotels near Kennedy Airport as the site for transactions involving Congressmen from New York, New Jersey, and Pennsylvania.

vacated mem., 429 U.S. 909, *reinstated*, 547 F.2d 772 (2d Cir. 1977), *cert. dismissed*, 436 U.S. 31 (1978). It has not been used as a general corrective authority over the conduct of criminal investigations, and, in light of *Paynor*, its scope is surely not to be expanded. Appellants are entitled to no more from the courts than a testing of Abscam against constitutional standards.

IV.

We consider next a series of claims that arise in one or another of the three trials.

A. *Myers* Trial

1. *Sufficiency of Evidence.* Criden and Johanson both challenge the sufficiency of the evidence to establish that they knew the purpose for which the money was paid to Myers. The record shows their awareness at the early stages of the plan; their law partner, Cook, testified that after the meeting on the yacht, Criden and Johanson told him about the sheik's concern for asylum in the United States and that payment to Congressmen would assure a "friendly face" who "owed him a favor" and would "help" him. Criden's claimed assurance that the Congressmen would never have to do anything does not lessen his and Johanson's knowledge that the money was being corruptly received for a promise to be influenced concerning official action, whether or not the promise was intended to be kept. Criden's attendance at and participation in the January conversations with Myers in Philadelphia leave no doubt whatever of his knowledge. Johanson's knowledge was fairly inferable by the jury from his initial hearing of the plan, his recruitment of Myers, his receipt of cash, and his acknowledgment to the FBI

that he had had many sleepless nights but had not been able to resist the chance to make some easy money. This non-hearsay evidence of Johanson's culpability justified the admission against him of the acts and declarations of the co-conspirators. *See United States v. Mastropieri*, No. 81-1017 (2d Cir. July 20, 1982), slip op. 4011-21.

2. *Evidentiary Ruling.* The *Myers* appellants contend that it was error to admit into evidence the January, 1980 conversations that Myers and Criden had with undercover agents Wald and Haridopoulos at the Barclay Hotel in Philadelphia. In these conversations Myers demanded an additional $35,000 to bring his share up to the $50,000 he had expected to receive from the August 22, 1979, meeting; he also discussed possible investments by the sheik that would provide a justification for his assistance with immigration matters. Appellants contend that these conversations were evidence of other crimes occurring after the end of the conspiracy concerning the August 22 payment and were inadmissible under Feb. R. Evid. 404(b). The argument builds upon the ruling Judge Pratt made when the evidence was offered. Anxious to keep the jury's attention focused on the August 22 episode, Judge Pratt told the jury that the January conversations were "outside the conspiracy charged in the indictment" and should be considered as acts and statements "only against the defendant who made them." In fact, the conversations, illuminating the nature of the conspiracy and occurring while the conspiracy was still in existence, were fully admissible against all defendants. Judge Pratt's limiting instruction, as he recognized, was unduly favorable to the defendants and affords them no basis to complain.

3. *Jury Instructions.* Criden levels several attacks upon the charge in the *Myers* trial, none of which has

merit. It was not error for the District Court to decide the appellants' due process claims, without submitting them to the jury. *United States v. Nunez-Rios*, 622 F.2d 1093, 1098 (2d Cir. 1980). In a general observation in the portion of the charge concerning witness credibility, Judge Pratt told the jury that they may consider a witness's prior "failure to disclose information, when the opportunity to do so presented itself." Criden apprehends that the jury may have taken this as permission to draw an adverse inference from Myers' silence during the course of an interview with FBI agents. This portion of the charge was not directed at Myers, the jury was not told that Myers had exercised his right to remain silent during the interview, and in any event, Myers' failure to give his version of the facts was probative since he had elected to make statements to the agent before deciding to end the interview. *See Anderson v. Charles*, 447 U.S. 404 (1980) (per curiam). It was not improper to refer to Weinberg as an "informer," and the charge adequately cautioned the jury concerning his testimony. Finally, it was surely not prejudicial error, if error at all, to omit the requested instruction that the jury may infer that tapes and unrecorded portions of tapes not produced by the Government would be unfavorable to the prosecution if the jury found that such tapes or portions "could" have contained pertinent material. The failure to record all conversations and all portions of taped conversations and the dispute concerning whether Weinberg had purposely erased two tapes of conversations with Errichetti were fully argued to the jury.

B. *Lederer* Trial.

1. *Evidentiary Ruling*. Lederer contends that evidence was introduced at his trial in violation of the

Speech or Debate Clause. He objects to the admission of his annual financial disclosure statement, filed with the Clerk of the House of Representatives pursuant to the Ethics in Government Act of 1978, 2 U.S.C. § 701 *et seq.* (Supp. IV 1980). In that statement Lederer falsely listed his $5,000 share of the bribe as a "consulting fee" from Johanson. The financial report was not shielded by the Speech or Debate Clause. Though the Clause, in covering "legislative acts," *Gravel v. United States,* 408 U.S. 606, 625 (1972), extends beyond words spoken during legislative debate, any other matters it reaches "must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings . . . ." *Id.* Disclosure of income from sources other than employment by the United States, *see* 2 U.S.C. § 702(a)(1)(A), is no part of such "deliberative and communicative processes." *Cf. Hutchinson v. Proxmire,* 443 U.S. 111 (1979) (newsletters and press releases); *United States ex rel. Hollander v. Clay,* 420 F. Supp. 853 (D.D.C. 1976) (Congressional travel vouchers). Prosecutions for falsification of similar statements indicate that Lederer's financial disclosure statement was not shielded. *See United States v. Bramblett,* 348 U.S. 503 (1955) (prosecution for false statement to House Disbursing Office); *United States v. Diggs,* 613 F.2d 988 (D.C. Cir. 1979) (prosecution for false statement to House Office of Finance), *cert. denied,* 446 U.S. 982 (1980).

2. *Jury Instructions.* Lederer's two objections to the charge are without merit. It was not error for Judge Pratt to explain "predisposition" by asking the jury to determine whether the defendant was "ready and willing" to commit the crimes charged whenever a favorable opportunity arose. *United States v. Sherman,* 200 F.2d 880, 882

(2d Cir. 1952). Lederer would have preferred an explanation that required finding a "previous intent or purpose," as some courts have phrased the test, *e.g., United States v. Karas*, 624 F.2d 500, 503 n.2 (4th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981). In this Circuit, the "ready and willing" phrase has been repeatedly used. *E.g., United States v. Martinez-Carcano*, 557 F.2d 966, 969-70 (2d Cir. 1977); *United States v. Rosner*, 485 F.2d 1213, 1222 nn.11 & 12 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974); *United States v. Braver*, 450 F.2d 799, 801 n.4, 805 (2d Cir. 1971), *cert. denied*, 405 U.S. 1064 (1972). The jury need not find that the defendant consciously considered committing the crime before the opportunity arose, only that he was predisposed to accept the opportunity presented to him, *i.e.*, of a frame of mind that made him "ready and willing" to commit a crime, even on the first occasion that he may have considered it.

Nor was it improper to tell the jury, in the course of explaining that the defendant has no obligation to present any evidence, that a defendant has the power to subpoena witnesses. This phrase prompted no objection at trial, and cannot be raised on appeal. In any event, there is no merit to Lederer's suggestion that the jury might have mistakenly thought he could have called Errichetti, Criden, and Johanson to support his entrapment claim. Having failed to subpoena his severed co-defendants, Lederer cannot assume that their testimony was not available to him. *Cf. United States v. Wright*, 588 F.2d 31, 36 (2d Cir. 1978) (failure to subpoena witness precludes claim that lack of use immunity for the witness created prejudice), *cert. denied*, 440 U.S. 917 (1979).

C. *Thompson-Murphy* Trial

1. *The "Impossibility" Defense.* Thompson contends that the indictment against him fails to state an offense on the theory that the fictional nature of the "sheiks" and their immigration problems renders the crime of bribery, as alleged in the indictment, impossible of performance. The "impossibility" defense has been a matter of conflicting views. *Compare People v. Jaffe,* 185 N.Y. 497, 78 N.E. 169 (1906) (defense upheld as to a "fence" who bought goods from a police informant that were not in fact stolen), *and State v. Guffey,* 262 S.W.2d 152 (Mo. App. 1953) (defense upheld as to a hunter who shot a stuffed deer placed as a decoy by a game warden), *with People v. Rojas,* 55 Cal. 2d 252, 358 P.2d 921 (1961) (rejecting defense as to a "fence" who bought goods not in fact stolen). Federal courts have upheld the defense when the crime charged had not in fact occurred, even though the defendant thought it had. *E.g., United States v. Oviedo,* 525 F.2d 881 (5th Cir. 1976) (sale of uncontrolled substance incorrectly believed to be controlled substance); *United States v. Berrigan,* 482 F.2d 171 (3d Cir. 1973) (transmittal of letters to prison inmate incorrectly believed to be without warden's knowledge).

The claim is unavailing here for the basic reason that the crime charged did occur. The indictment charged and the evidence established that Thompson received a bribe in return for his corrupt promise to take official action. That suffices to constitute a violation of § 201(c). *United States v. Brewster, supra,* 408 U.S. at 525-26. Whether the promise was carried out is irrelevant, *id.* at 527, and it is no defense that the promise could not have been carried out either because the official act to be taken was beyond the defendant's authority, *United States v. Carson,* 464

F.2d 424, 433 (2d Cir.), *cert. denied*, 409 U.S. 949 (1972); *United States v. Heffler*, 402 F.2d 924 (3d Cir. 1968), *cert. denied*, 394 U.S. 946 (1969), or had already been taken, *United States v. Arroyo, supra*, 581 F.2d at 653-57; *cf. United States v. Rosner, supra*, (18 U.S.C. § 201(b), punishing the bribe-payer, is violated whether or not purpose of the bribe is capable of attainment); *United States v. Jacobs, supra*, 431 F.2d at 759 (same).[22] Neither is it a defense that the public official will not be called upon to take official action because of the fictitious nature of the person alleged to be seeking assistance. "Official act" is defined as action on any matter that "may at any time be pending" before a public official, 18 U.S.C. § 201(a). Introducing a private immigration bill qualifies as an "official act," whether or not the beneficiary of such a bill is a real person. It was not necessary for the investigators to continue Abscam to the point of having bills introduced, conduct that would, in any event, have been immunized by the Speech or Debate Clause. *See United States v. Johnson*, 383 U.S. 169, 180 (1966).

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22 Thompson relies on *United States v. Reisley*, 35 F. Supp. 102 (D.N.J. 1940), in which Circuit Judge Maris, sitting in the District Court, upheld a defense to an indictment charging violation of 18 U.S.C. § 203 (1934), a conflict of interest statute that preceded 18 U.S.C. § 281 (1958) and 18 U.S.C. § 203 (1976). An employee of the Veterans Administration had received money for promising to effect an increase in the payor's benefits. In fact, the increase had already occurred without any action by the defendant. *Reisley* viewed the offense as accepting payment for services rendered, and acquitted the defendant since in fact services had not been rendered. Even if that decision is correct as to a conflict of interest violation, its force as applied to a bribery violation is negated by the explicit Congressional recognition, expressed by the House Committee on the Judiciary when the current bribery statutes were revised in 1962, that "it is the purpose for which the recipient knows the bribe is offered or given when he solicits, receives, or agrees to receive it which is determinative of criminality." H. Rep. No. 748, 87th Cong., 1st Sess. 18 (1961). The House Report cited approvingly to *Whitney v. United States*, 99 F.2d 327, 331 (10th Cir. 1938), which had construed an early bribery statute, 18 U.S.C. § 207 (1934), contrary to *Reisley*'s view of a conflict of interest statute.

2(a). *Jury Instructions — Element of Receipt.* Thompson and Murphy both challenge portions of the jury instructions. One claim, applicable to all of the substantive counts, attacks Judge Pratt's supplemental instruction, in response to a jury inquiry, concerning the element of receipt of illegal payment. Understanding the claim requires some elaboration of the pertinent circumstances. The counts of the indictment charging violations of bribery, unlawful gratuity, and conflict of interest all alleged receipt of money between October 10, 1979, and February 2, 1980. The Government's theory of the *Thompson-Murphy* case was that the substantive offenses committed by both Thompson and Murphy arose out of the October 20 transaction involving Murphy and Criden, not the October 9 transaction involving Thompson and Criden. In its bill of particulars the Government alleged that the $50,000 cash payment "was received by Criden and Murphy on October 20, 1979 . . . . Criden left the meeting in physical possession of the money. The date on which and the place where Murphy took physical possession of his share of the payment is [*sic*] unknown." In charging the jury initially with respect to the "receipt" element of Count Two, the bribery offense, Judge Pratt focused the jury's attention on the issue of whether either defendant had received a share of the $50,000 *after* the October 20 meeting: "It is for you to determine based on all of the evidence whether the Government has established beyond a reasonable doubt that the money in the briefcase transferred from Amoroso to Criden on October 20th was for the benefit of and *eventually received* by defendant Murphy or defendant Thompson or both." (Emphasis added.) The jury was told that this "receipt" element also applied to the unlawful gratuity and conflict of interest counts, and that a defendant who

did not receive part of the money must be acquitted on all the substantive counts.

The jury's first inquiry on this issue read as follows:

> Your Honor, If this question is in order—
>
> If the briefcase was under the control of but not in the physical possession of the defendant Murphy, does [*sic*] that, under your charge, be considered "for the benefit of an eventual reception by defendant Murphy or defendant Thompson or both?["]

Judge Pratt apparently thought that the jury mistakenly understood that Murphy's possession of the briefcase at the October 20 meeting was a required aspect of a finding of receipt by him. He therefore gave a supplemental instruction that included the following:

> In specific answer to your question, as I interpret it, actual possession of the briefcase itself by Murphy would not have to be shown before you could determine that he later received part of the money.

The correctness of this response is not challenged on appeal. It soon became apparent that the jury had not wondered whether Murphy's actual possession on October 20 was required; they were making the more trenchant inquiry as to whether his constructive possession on that date was sufficient. Their subsequent note read as follows:

> Your honor:
>
> Some members of the jury feel it is possible that defendant Murphy took "direction & control" of the briefcase however momentarily by instructing Criden to take physical possession, making Criden the "executor" of the money in a sense at that point.

> May we construe this to be in satisfaction of element one of Count 2 in lieu of "*eventually*["] receiving the money at some later time? [Emphasis original.]

This inquiry provoked an extended colloquy between Court and counsel. Murphy contended that the inquiry should be answered with a simple "no," arguing that any other response would unfairly alter the Government's theory of how the offense occurred. This concern was heightened when the prosecutor, in urging that the proper response was "yes," pointed out that the bribery statute is violated when a public official receives anything of value either "for himself or for any other person or entity." Ultimately, Judge Pratt decided to steer a middle course, rejecting a "no" answer and also rejecting the Government's effort to permit the jury to convict Murphy on the theory that he was merely seeking to confer a benefit upon Criden. Instead, Judge Pratt kept the jury's attention focused on the crucial element of whether money was received by Murphy and for his benefit, but permitted the jury to consider whether receipt by Murphy was established by his words and conduct at the October 20 meeting. First, he reminded the jury to focus on the essential element of count Two, which he summarized as being "that on or shortly after October 20, 1979, the defendant received a sum of money." He then endeavored to paraphrase the jury's inquiry and respond to it:

> When I said in the charge it is for you to determine based upon all the evidence whether the Government has established beyond a reasonable doubt that the money in the briefcase transferred from Amoroso to Criden on October 20th, was *for the benefit and*

> *eventually received* by the defendant Murphy, or defendant Thompson, or both, when I use the term "eventually," there did I really mean eventually and not then, October 20th[?]
>
> And my answer to that is[:] you in applying this element to the defendant Murphy, you may disregard the term eventually. It is for you to evaluate what was said, what happened, what the circumstances were, and determine from that whether the defendant Murphy received the money. [Emphasis added.]

Since the major factual dispute framed by Murphy's cross-examination and summation was whether Murphy had any knowledge that money was in the briefcase, Judge Pratt emphasized that the element of receipt could not be established unless the jury found that Murphy knew that money was in the briefcase. He then recapitulated his response in these words:

> So my final answer to your question is: If you are talking simply about the temporal aspect of this, the timing now as opposed to eventually, the answer is yes. You may construe those circumstances to be receipt of money on or shortly after October 20, 1979, as that set forth in the element one of Count 2.

Significantly, the only criticism voiced by counsel after hearing the supplemental instruction was to request that one sentence of the response might have been misunderstood as altering the Government's burden of proof as to knowledge. Judge Pratt promptly recalled the jury and reemphasized, as he had when the inquiry was first answered, that the burden to prove Murphy's knowledge of the money beyond a reasonable doubt rested upon the Government.

The supplemental instruction presents no ground on which either Murphy or Thompson may now complain.[23] Judge Pratt's response did not alter the requirement that the money be received for the benefit of the defendant.[24] Limiting himself to the precise point raised by the jury, he broadened only the temporal aspect of receipt. He permitted a finding of receipt not only at some point after October 20 but also at the time of the October 20 meeting. This permitted the jury to find that Murphy had constructively received the money for himself on October

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23 Complaint is also made that Judge Pratt did not adequately alert counsel to his proposed response before giving it to the jury. *See United States v. Ronder*, 639 F.2d 931 (2d Cir. 1981). Although Judge Pratt did not give counsel a verbatim version of his proposed response, he held an extended colloquy with counsel, afforded both sides an opportunity to suggest their preferred responses, then outlined, in summary fashion, the response he proposed to give, and thereafter allowed counsel to make further argument. There is no basis for procedural complaint, especially in view of the fact that counsel's remarks, after hearing what Judge Pratt proposed to do, questioned only the substance of the response and offered no suggestion that might improve its wording.

24 Murphy was acquitted on the bribery count and therefore challenges the supplemental instruction only as it may have affected the element of receipt for the unlawful gratuity and conflict of interest counts, the substantive counts on which he was convicted. Since we conclude that the supplemental instruction did not alter the prosecution's obligation to prove that Murphy must be shown to have received the money for his benefit, we are willing to assume, for the sake of argument, that, though the jury's inquiry mentioned only Count Two, they understood the response also to apply to the receipt element of the counts charging an unlawful gratuity and a conflict of interest. In his initial charge, Judge Pratt had told the jury that the element of receipt as to bribery applied equally to the other substantive offenses. Section 201(g), punishing receipt of an unlawful gratuity, is limited to receipt by the public official "for himself," and "for any other person or entity" as provided in section 201(c), punishing bribery. We are also willing to assume, for the sake of argument, that section 203(a), punishing conflict of interest, is limited to receipt of compensation by and for the public official, though this point is somewhat doubtful. *Cf. United States v. Shirey*, 359 U.S. 255 (1959) (construing 18 U.S.C. § 214 (1958) (now 18 U.S.C. § 210 (1976)).

20 and had permitted Criden to take physical possession, presumably with the expectation that at some point Murphy would regain physical possession of a portion of the money, even if the occurrence of that last step was not found to have been established.[25] The jury wanted to know if receipt could be found to have occurred on October 20, and Judge Pratt correctly told them that it could. Since the principally disputed issue as to Murphy was whether he knew there was any money in the briefcase on October 20, it is difficult to see how the defense would have acted differently if it had been specifically alerted to a theory of receipt on October 20, a theory that, in any event, was comprehended by the bill of particulars. In arguing the point on appeal, Murphy makes no showing of any prejudice from the supplemental instruction. Thompson likewise offers no theory of prejudice as to him. The jury's question and the Court's response both related explicitly to Murphy, leaving unvaried in any respect the initial instruction that the jury must find Thompson to have received his share of the October 20 payment sometime after the meeting.

Murphy contends that the instruction permitted the jury to find receipt on a theory of constructive possession without adequate guidance as to the standards governing that concept. That complaint cannot be made now. Counsel had ample opportunity after hearing both the substance of Judge Pratt's proposed response and the

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25 Early in the colloquy with counsel, Judge Pratt had suggested that it would be "kind of a far-out view" if the jury thought that on October 20, Murphy "really didn't accept [the money] for his own benefit" and was "giving it up to Howard Criden with no further claims on it." On appeal counsel dwell on this characterization, overlooking the fact that the supplemental instruction that Judge Pratt decided to give did not permit the jury to abandon the requirement that Murphy must receive the money for his own benefit.

delivery of the response to suggest additional language explicating constructive possession. If the jury's approximation of the concept evident from the text of their inquiry required refinement, the opportunity for amplification was available to the defendants both before and after the instruction was given. This is not the first time that a jury's question has insightfully gone to the heart of a matter. Judge Pratt's handling of the episode was admirable under the circumstances.

2(b). *Jury Instructions—the Section 203(a) Offense.* Murphy challenges the jury instruction concerning the elements of Count Three, the so-called conflict of interest offense, 18 U.S.C. § 203(a). His principal point is that section 203(a) proscribes receipt of payment for rendering only "representational" services before government agencies, whereas the District Court's instruction permitted the jury to find a violation for rendering services of a broader nature including merely giving advice.[26] The claim requires consideration of the structure of the text of section 203(a), which reads as follows:

> Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receives or agrees to receive, or asks, demands, solicits, or seeks, any compensation for any services rendered or to be rendered either by himself or another—

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26 Murphy also contends that the charge was deficient in not specifying as an element of the offense that the proceeding in relation to which services are rendered be *pending* before a governmental forum. However, the statute contains no requirement of a proceeding pending at the time compensation is received. *United States v. Evans*, 572 F.2d 455, 481 (5th Cir.), *cert. denied*, 439 U.S. 870 (1978); *United States v. Johnson*, 337 F.2d 180, 196 (4th Cir. 1964), *aff'd*, 383 U.S. 169 (1966).

(1) at a time when he is a Member of Congress, Member of Congress Elect, Delegate from the District of Columbia, Delegate Elect from the District of Columbia, Resident Commissioner, or Resident Commissioner Elect; or

(2) at a time when he is an officer or employee of the United States in the executive, legislative, or judicial branch of the Government, or in any agency of the United States, including the District of Columbia,

in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court-martial, officer, or any civil, military, or naval commission, [shall be punished].

From the standpoint of grammar, the issue is whether the phrase "before any department, agency, court-martial, officer, or any civil, military, or naval commission" modifies the category of covered proceedings or the category of covered services. The placement of the "before" phrase adjacent to the category of covered proceedings is some indication that only the immediately preceding category was intended to be modified. But this structural point is not so compelling as to preclude examination of legislative history. The Report of the Senate Committee on the Judiciary describes the predecessor statute, 18 U.S.C. § 281 (1958), as prohibiting Members of Congress and officers and employees of the Government "from receiving compensation for services rendered

for others before a Federal department or agency in matters in which the Government is a party or is interested." S. Rep. 2213, 87 Cong., 2d Sess. 9, *reprinted in* 1962 U.S. Code Cong. & Ad. News 3852, 3858. In section 281 the "before" phrase had appeared in the same position as it does in section 203(a), yet the drafters of the Senate Report apparently thought the phrase modified the services rendered. The Report points out that section 203(a) continues the restraint of the prior section "in full effect" with one exception not here pertinent. *Id.* The Report of the House Committee on the Judiciary contains two references to our problem; unhappily each points in a different direction. The summary of provisions, like the Senate Report, describes the predecessor statute, section 281, as prohibiting receipt of compensation "for services rendered before Federal agencies" in matters in which the United States has an interest. H. Rep. No. 748, 87th Cong., 1st Sess. 9 (1961). However, the section-by-section analysis describes former section 281 as prohibiting receipt of compensation "for services in relation to any matter in which the United States is interested and which is before any Government agency." *Id.* at 19. Our uncertainty remains.

Fortunately, section 203(a)'s statutory genealogy provides significant clues to its meaning. In 1864, Civil War scandals involving corrupt use of influence prompted Congress to pass section 203(a)'s earliest predecessor, a statute barring Members of Congress and federal employees from receiving compensation for rendering services in governmental proceedings before federal departments, agencies, and military commissions. Act of June 11, 1864, ch. 119, 13 Stat. 123.[27] Although the language of

[27] *See Ass'n of the Bar of the City of New York, Conflict of Interest and Federal Service* 40 (1960).

(Footnote continued)

this early statute shares the grammatical ambiguity of current section 203(a), the legislative debate that surrounded its passage reveals that Congress was primarily concerned with government officials' being paid to bring their influence to bear on federal agencies. According to Senator Trumbull, Chairman of the Senate Judiciary Committee, the statute was designed "to prevent Representatives and Senators in Congress and officers of the government who are paid for their services from receiving a compensation for advocating claims in the Departments and before the bureaus of Government." Cong. Globe, 38th Cong., 1st Sess. 561 (1864).

In interpreting the more recent predecessors of section 203(a), modern courts and commentators have agreed that an essential element of the offense is some appearance before, or at least contact with, a federal department by the accused official. In *United States v. Adams*, 115 F. Supp. 731, 735 (D.N.D. 1953), *appeal dismissed*, 209 F.2d 954 (8th Cir. 1954), a District Court dismissed an indictment based on 18 U.S.C. § 281 (1952), section 203(a)'s

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The original statute read as follows:

> [N]o member of the Senate or House of Representatives shall, after his election and during his continuance in office, nor shall any head of a department, head of a bureau, clerk, or any other officer of the government receive or agree to receive any compensation whatsoever, directly or indirectly, for any services rendered, or to be rendered, after the passage of this act, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever.

The statute was recodified in essentially the same form in R.S. § 1782 (1873). Later, it was modestly revised and amended by Act of Mar. 4, 1909, ch. 321, § 113, 35 Stat. 1088, 1109. Afterwards, it was recodified at 18 U.S.C. § 203 (1926) where it remained until the 1948 revision of the federal criminal laws placed it, along with some minor amendments, at 18 U.S.C. § 281 (1952).

most recent predecessor, because the indictment failed to allege that the defendant's services were to be rendered before a federal department. *Accord United States v. Waldin*, 122 F. Supp. 903, 904 (E.D. Pa. 1954).[28] A review of the legislative history and cases has led a knowledgeable commentator in this area to conclude that under section 203(a), and all its predecessors, "criminal penalty attaches to a government employee's compensated services if, and only if, the services are performed in particular designated forums." B. Manning, *Federal Conflict of Interest Law* 55 (1964). This background suggests that section 203(a) should be limited to services rendered before federal agencies—the mischief toward which the statute was directed—and not mere advice concerning agency proceedings.

A further consideration favoring this construction is the hazards created by a broader interpretation. Since a Member of Congress is entitled to appear before courts, even on matters in which the United States has an

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28 In most of the cases interpreting section 203(a), the defendants had actually rendered services before a federal agency. *See, e.g., Burton v. United States*, 202 U.S. 344 (1906); *May v. United States*, 175 F.2d 994 (D.C. Cir.), *cert. denied*, 338 U.S. 830 (1949); *United States v. Johnson*, 419 F.2d 56 (4th Cir. 1969), *cert. denied*, 397 U.S. 1010 (1970). It is of interest, though not decisive, that some of these decisions describe the statute as prohibiting the rendering of services before a federal department. In *Burton*, the Supreme Court, upholding the constitutionality of R.S. § 1782 (1873), a predecessor of section 203(a), referred to the authority of Congress to make it an offense for a Senator to receive compensation "for services to be rendered or rendered to any person, before a department of the government, in relation to a proceeding" in which the United States has an interest. 202 U.S. at 365; *see also United States v. Johnson*, 215 F. Supp. 300, 316 (D. Md. 1963) ("The words 'before any department, agency,' etc. refer to where the services have been rendered or are to be rendered, not where the proceeding or other matter is pending."), *aff'd on other grounds*, 337 F.2d 180, 196 (4th Cir. 1964), *aff'd*, 383 U.S. 169 (1966); *United States v. Booth*, 148 F. 112, 119 (C.C.D. Or. 1906) ("the service must be performed, 'before any department [etc.]' ").

interest, *see, e.g., United States v. Waldin, supra; United States v. Quinn,* 111 F. Supp. 870 (E.D.N.Y. 1953), he may encounter a situation where a matter concerning his client merits court challenge but requires prior exhaustion of administrative remedies. Unquestionably the Member would be barred by section 203(a) from handling the matter before the administrative agency, and some courts apparently believe that section 203(a) prevents a government official from plea-bargaining with the Justice Department when the official is representing a criminal defendant. *See Chudoff v. McGranery,* 179 F.2d 869 (3d Cir. 1950). *But see United States v. Johnson,* 215 F. Supp. 300, 315 (D. Md. 1963), *aff'd on other grounds,* 337 F.2d 180 (4th Cir. 1964), *aff'd,* 383 U.S. 169 (1966). But, under the Government's view in the instant appeal, a federal official would also violate section 203(a) if the official, in the course of counseling his client, advised him to obtain additional counsel for representation before a federal department or agency. It seems unlikely that Congress, having framed section 203(a) to allow Members of Congress to represent clients in court, intended the statute to reach so far as to raise the prospect of a criminal violation when the lawyer-legislator counsels his client.

The Government suggests that a broad reading of section 203(a) is supported by a comparison of its terms with those of 18 U.S.C. § 205, set out in the margin,[29]

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[29] Whoever, being an officer or employee of the United States in the executive, legislative, or judicial branch of the Government or in any agency of the United States, including the District of Columbia, otherwise than in the proper discharge of his duties—

(1) acts as agent or attorney for prosecuting any claim against the United States, or receives any gratuity, or any share of or interest in any such claim in consideration of assistance in the prosecution of such claim, or

(Footnote continued)

which explicitly covers representational activities. Section 205 applies only to officers or employees of the United States and not to Members of Congress. It covers the identical category of proceedings described in section 203(a). Its list of forums is similar to that in section

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(2) acts as agent or attorney for anyone before any department, agency, court-martial, officer, or any civil, military, or naval commission in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest—

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

18 U.S.C. § 205 (1976). Section 205(1)'s earliest statutory forebear was enacted in 1853. It read:

[A]ny officer of the United States, or person holding any place of trust or profit, or discharging any official function under, or in connection with, any executive department of the Government of the United States, or under the Senate or House of Representatives of the United States, who, after the passage of this act, shall act as an agent or attorney for prosecuting any claim against the United States, or shall in any manner, or by any means, otherwise than in the discharge of his proper official duties, aid or assist in the prosecution or support of any such claim or claims, or shall receive any gratuity, or any share of or interest in any claim from any claimant against the United States, with intent to aid or assist, or in consideration of having aided or assisted, in the prosecution of such claim, shall be liable to indictment, as for a misdemeanor, in any court of the United States having jurisdiction thereof, and, on conviction, shall pay a fine not exceeding five thousand dollars, or suffer imprisonment in the penitentiary not exceeding one year, or both, as the court in its discretion shall adjudge.

Act of Feb. 26, 1853, ch. 81, § 2, 10 Stat. 170. This statute was recodified in essentially the same form in R.S. § 5498 (1873). Later, it was amended by Act of Mar. 1, 1901, ch. 670, § 1, 31 Stat. 844, and Act of Mar. 4, 1909, ch. 321, § 108, 35 Stat. 1088, 1107-08. Afterwards, it was recodified at 18 U.S.C. § 198 (1926), recodified again at 18 U.S.C. §§ 198, 198a (1934), and amended once more by the 1948 revision of the federal criminal laws. Finally, it was codified at 18 U.S.C. § 283 (1952).

This statute was most recently revised in 1962. Act of Oct. 23, 1962, Pub. L. 87-849, § 1(a), 76 Stat. 1122. The verbosity of previous versions was eliminated, and section 205(2) was added.

203(a) with the notable addition of "courts."[30] But section 205 differs markedly from section 203(a) in two respects. First, section 205 prohibits conduct whether or not performed for compensation, whereas section 203(a) prohibits only conduct rendered for compensation. Second, and central to the Government's argument, section 205 prohibits an official from acting "as agent or attorney for anyone," whereas section 203(a) prohibits rendering "any services." From this latter difference the Government argues that Congress intended section 203(a) to proscribe a wider range of services than the representational services proscribed by section 205. The argument has some force, but is not decisive. Even as to officers or employees of the United States, who are covered by both statutes, the conduct proscribed by section 203(a) could be limited to services rendered before federal agencies, without completely duplicating the prohibition of section 205. Section 203(a) would then cover any contact made with an agency, whether or not the official was acting as agent or attorney, as specified in section 205.

The legislative history of section 205 undermines the Government's claim of a clear-cut distinction between sections 205 and 203(a). A House Report accompanying the 1962 revision of the federal conflict of interest laws states that the purpose of section 205 is to prevent federal employees "from using actual or supposed influence in support of private causes." H.R. Rep. No. 748, 87th Cong., 1st Sess. 21 (1961). The Report recognized that "section 281 [now section 203(a)] prohibits conduct *of this nature* when compensated," but added that "it is

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30 The combined effect of omitting Members of Congress from section 205 and omitting courts from the forums listed in section 203(a), which applies to Members of Congress, permits Members of Congress to appear before courts.

important that this type of representative activity be prohibited when it is not compensated." *Id.* (emphasis added). This suggests, contrary to the Government's contention, that the conduct prohibited by sections 203(a) and 205, both of which apply to federal employees, is similar. Both involve using actual or supposed influence, with section 205, but not section 203(a), requiring a formal representational role. As pointed out in a Justice Department memorandum of which Congress has taken note, "[W]hile section 203 is controlling as to Members of Congress, for all practical purposes section 205 completely overshadows section 203 in respect of officers and employees of the Government."[31] Memorandum of Attorney General—Standards of Ethical Conduct for Government Officers and Employees, Exec. Order No. 11,222 (1965), *reprinted in* 18 U.S.C. § 201 note, at 1025-32 (1976). If section 205 in fact largely duplicates section

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31 Significantly, this memorandum describes section 203(a) as prohibiting Members of Congress and government employees from receiving compensation "for services rendered on behalf of another person before a Government department." 18 U.S.C. § 201 note, at 1028.

The parties call our attention to other views previously expressed by the Department of Justice, of which Congress has taken note. Murphy cites a Senate Judiciary Report that includes the following: "The Department of Justice has, however, followed the more restrictive interpretation that the services rendered for compensation by the public servant must be representational in nature and not merely in the form of advice or assistance in writing contracts and the like." *Criminal Code Reform Act of 1977: Report of the Senate Judiciary Comm.*, S. Rep. No. 95-605, 95th Cong., 1st Sess. pt. 1, at 403 (1977). The Government cites the following statement, submitted by the Department of Justice to a House Judiciary Subcommittee: "[A]ny utilization of official position to serve a private client, whether to influence the action of others or not, seems within the ban of the statute." Memorandum of the Office of Legal Counsel for the Attorney General (Dec. 10, 1956), *reprinted in Federal Conflict of Interest Legislation: Hearings Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 86th Cong., 2d Sess., ser. 17, pt. 2, at 645-46 (1960).

203(a), as applied to federal employees, the Government cannot now argue that the two sections have two entirely distinct purposes.

The Government finally contends that section 203(a) should be broadly read to make sure that Members of Congress do not receive any extra compensation for rendering advice on governmental matters, advice that falls within their obligations to their constituents and the public generally. If Congress were to legislate that broadly, it would have to clarify the line between permissible legal practice and illegal advice on governmental matters.[32] Under all the circumstances, though we cannot be certain what Congress had in mind in the original enactment in 1864 or the revision in 1962, we think it sounder to construe section 203(a) to reach only services performed or to be performed before the federal forums listed in the statute.

This interpretation, however, is not quite as limited as the "representational" role urged by Murphy. It includes, in the words of the statute, "any services . . . in relation to" the proceedings listed in the statute so long as the services are compensated and are rendered "before" the listed forums, whether or not the Member of Congress formally appears as attorney or agent. And, of course, informal contacts, as well as formal appearances, are proscribed.

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32 To a considerable extent, the Government's concern that Members of Congress should not be permitted to accept extra compensation for performing their duties is met by the provisions of the unlawful gratuity statute, 18 U.S.C. § 201(g) (1976), which formed the basis for Murphy's conviction on Count Five. Though that statute is broad in scope, it is limited to receipt of payment because of "any official act" performed or to be performed, and does not extend to the giving of advice, which the Government would include under § 203(a).

In the *Thompson-Murphy* trial, Judge Pratt, over the objection of Murphy,[33] gave the jury a broad definition of the "services" element of a violation of section 203(a). Rather than limit the term "services" to those to be performed "before" a federal agency, as we construe the statute to require, he told the jury that the term could include "a wide variety of services such as giving advice about [i]mmigration, how to delay deportation, how to improve one's chances of remaining in the country . . . ." The summation on behalf of Murphy had argued, based on some of the phrases he used at the October 20 meeting, that he was only advising the sheik's representatives to consult with Criden, who would handle legal matters concerning immigration problems. Since the charge erroneously permitted the jury to convict on Count Three by considering this type of advice to be covered by section 203(a), the conviction on that count must be reversed. However, since the evidence was suffi-

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33 The Government contends that Murphy waived objection to the charge by not objecting after its delivery to the jury, as required by Fed. R. Crim. P. 30. However, Murphy submitted a proposed instruction on section 203(a), which limited the prohibited services to "interceding" with federal agencies and made clear that advising a person to seek the advice of attorneys is not improper. "Interceding" may connote in some minds a more direct action than the rendering of "any" services "before" a federal forum "in relation to" a proceeding in which the United States has an interest. Nevertheless, the proposed instruction, if not precisely correct, sufficiently alerted the District Court to Murphy's well-taken point that giving advice is outside the reach of the statute. Normally, the submission of a requested instruction is not sufficient to preserve for appeal complaint that the charge as given failed to include it, *see United States v. Fountain*, 642 F.2d 1083, 1095 (7th Cir.), *cert. denied*, 642 U.S. 1083 (1981), but in this case, Judge Pratt informed counsel, after considering and ruling upon requested instructions at a charge conference, that their objections voiced at that time would suffice to preserve issues for appeal, in lieu of renewing claims for such instructions after the jury charge. In that circumstance, the pre-charge objection to the denial of the requested instruction satisfied Rule 30.

cient to permit a finding that Murphy had in fact accepted money for services to be rendered before federal agencies or departments on immigration matters, the Government is entitled to prosecute the section 203(a) charge anew, if it is so advised.

3. *Sufficiency of Evidence.* Thompson challenges the sufficiency of the evidence against him, contending that the evidence failed to show that he received a portion of the $50,000 transferred at the October 20 meeting with Murphy and Criden and failed to show that he agreed to take any official action. However, Cook testified that Criden told him about delivering Thompson's share to the Congressman at a coffee shop shortly after October 20. Thompson's meeting with Criden at the time and place Criden had mentioned to Cook was corroborated by eyewitness testimony. The jury was entitled to infer from the October 9 transaction with Thompson and Criden that Criden's report to Cook was credible. Thompson's agreement to take official action on immigration matters is fully established by his statements made at the morning meeting on October 9, the meaning of which is amplified by his statement to Congressman Murtha that "all we have to do is help these two Arabs get into the country perhaps sometime in the future."

Murphy's challenge to the sufficiency of the evidence claims that the prosecution did not prove his receipt of money for his benefit. The Government maintains that the evidence showed receipt by Murphy both at the October 20 meeting when the briefcase containing $50,000 was handed to Criden and at some point thereafter when Murphy obtained physical possession of his share of the $50,000. We confine our attention to the October 20 meeting, which is apparently what the jury did, judging from their inquiry concerning constructive

possession. In the context of the events that preceded that meeting, the episode could fairly be viewed by the jury as satisfying the receipt element of both of the substantive counts on which Murphy was convicted, unlawful gratuity and conflict of interest.[34] Criden and Thompson had developed an arrangement whereby money would be transferred by the sheik's representative without the necessity for Thompson physically to handle the briefcase in the presence of Amoroso and Weinberg. Using guarded conversation, Thompson and Criden would say only enough to satisfy the sheik's representatives that Thompson was acknowledging receipt of money. The arrangement, carried out on the evening of October 9, ended with Amoroso indicating the briefcase and Thompson saying to Criden, "You look after that for me will you?" Thompson then recruited Murphy, and the jury was entitled to infer, from the sequence of events and what they saw on videotape, that at the October 20 meeting Criden and Murphy were following the same arrangement previously employed by Criden and Thompson. There was just enough conversation about money to reassure the sheik's representatives that Murphy was acknowledging his awareness of a payment. Amoroso then moved the briefcase toward the couch where Murphy and Criden were seated, Criden said, "Why don't you give that to Jack?", and Murphy replied, "Howard why don't you take care of that."

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[34] As previously indicated, *supra* note 24, we are willing to assume, for the sake of argument, that both section 201(g) and section 203(a) require not only receipt of money but also receipt for the benefit of the defendant. In his initial instruction to the jury, Judge Pratt had explained that the "receipt" element of the bribery offense, section 201(c), required receipt for the benefit of the defendant and then stated, "This is a common element, either directly or indirectly, . . . in all of the substantive counts."

This evidence entitled the jury to find that Murphy had at that point received the money. Having struck an agreement to accept money in return for assistance with the immigration matter,[15] Murphy was in constructive possession of the money in the briefcase when he exercised the authority to direct that Criden should take physical possession of it. An illegal payment is sufficiently received when the person who has agreed to receive it directs that it be held by his "bag man."[16] The evidence also permitted the jury to find that Murphy received the money for his own benefit. The contrary inference, that he was agreeing to use his congressional influence in order to confer a benefit solely upon Criden, is utterly implausible.

4. *Evidentiary Rulings.* Thompson contends that the videotaping of his conversations with the undercover agents violated rights protected by the Fourth Amendment and, because he was a Congressman, also violated the First Amendment and the doctrine of separation of powers. The claim was not asserted at trial by a timely motion to suppress, *see United States v. Mauro*, 507 F.2d 802 (2d Cir. 1974), *cert. denied*, 420 U.S. 991 (1975), and, in any event, is without merit. Thompson's conversations with undercover agents in whom he chose to confide were not privileged, and mechanical recordings of the sights and sounds to which the agents could have testified were

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15 Though the jury was apparently not sufficiently persuaded that Murphy had agreed to take official action to convict him of bribery, they were entitled to use his statements indicating agreement as evidence of the context in which the handling of the briefcase was to be assessed for purposes of determining receipt.

16 The Government correctly points out that simply an agreement to receive money, rather than actual receipt, would violate section 201(g) and section 203. However, Judge Pratt instructed the jury that receipt was required.

proper evidence. *See United States v. White*, 401 U.S. 745, 749-53 (1971); *Lopez v. United States*, 373 U.S. 427, 437-40 (1963); 18 U.S.C. § 2511(2)(c). Since the tapes contained material evidence of criminal violations, they were not immunized by the circumstance that Thompson was a Congressman at the time the conversations occurred. *Cf. United States v. Nixon*, 418 U.S. 683 (1974).

Thompson claims that the Speech or Debate Clause bars the introduction into evidence of his private conversations with Congressman Murtha on the floor of the House of Representatives, in which he invited Murtha to join the ranks of those accepting bribes. One would think that a Congressman, even when grasping for objections to a criminal conviction, would understand that the Speech or Debate Clause accords immunity to what is said on the House floor in the course of the legislative process, *Gravel v. United States, supra*, not to whispered solicitations to commit a crime.

Conclusion

In considering the myriad issues raised by these seven appellants, we are not passing judgment on the wisdom of the Abscam investigation, nor on whether the means by which it was conducted conformed to internal administrative standards of the Department of Justice or to other standards that the Executive Branch might choose to adopt or the Legislative Branch might require. Our task is to determine whether the methods employed and the conduct of the ensuing trials render the resulting convictions invalid under the Constitution and laws of the United States or whether they present one of those rare occasions when we are authorized to vacate convictions in

the exercise of a limited supervisory power over the administration of federal criminal justice.

The four Congressmen were caught on videotape in the very act of committing federal crimes. There was sufficient evidence of their guilt and that of the other defendants. The conduct of the investigation, though subject to some criticism, affords no basis for rejecting the convictions. The pretrial proceedings conducted by Judge Mishler and the trial and post-trial hearings conducted by Judge Pratt were vigorous contests marked throughout by the fairness, patience, and thoroughness of the District Judges. We have carefully considered all of the appellants' claims, including those not discussed in this opinion, and, with the exception of the attack upon the charge as to section 203(a) in the *Thompson-Murphy* trial, we find them all to be without merit, both for the reasons we have set forth and for the further reasons detailed in Judge Pratt's comprehensive opinion denying post-trial motions in the District Court. 527 F. Supp. 1206. We reverse only the conviction of John Murphy on Count Three of the indictment in No. 81-1346,[37] which we remand for a new trial, and in all other respects all the judgments appealed from are affirmed.

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[37] The practical consequence is to reduce Murphy's aggregate fine from $20,000 to $10,000.

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UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of September, one thousand nine hundred and eighty-two.

Present:

HON. J. EDWARD LUMBARD,
HON. HENRY J. FRIENDLY
HON. JON O. NEWMAN, *Circuit Judges*

Nos. 81-1342, 81-1343, 81-1344, 81-1446,
81-1345, 81-1346, 81-1347

UNITED STATES OF AMERICA,
Appellee

v.

MICHAEL O. MYERS, ANGELO J. ERRICHETTI,
LOUIS JOHANSON and HOWARD L. CRIDEN,
Defendants-Appellants

UNITED STATES OF AMERICA,
Appellee

v.

FRANK THOMPSON, JR., and JOHN M. MURPHY,
Defendants-Appellants

UNITED STATES OF AMERICA,
Appellee

v.

RAYMOND F. LEDERER,
Defendant-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed on all counts as to all appellants, except Count Three (§203(a)) of the indictment against John M. Murphy, which is hereby reversed and remanded to the district court for a new trial in accordance with the opinion of this court.

A. Daniel Fusaro, Clerk

by Edward J. Guardaro,
Deputy Clerk

GPO 946-787

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 17th day of November, one thousand nine hundred and eighty-two.

Nos. 81-1342, 81-1343, 81-1344, 81-1446, 81-1345, 81-1346, 81-1347

UNITED STATES OF AMERICA,
Appellee

v.

MICHAEL O. MYERS, ANGELO J. ERRICHETTI, LOUIS JOHANSON and HOWARD L. CRIDEN,
Defendants-Appellants

UNITED STATES OF AMERICA,
Appellee

v.

FRANK THOMPSON, JR., and JOHN M. MURPHY,
Defendants-Appellants

UNITED STATES OF AMERICA,
Appellee

v.

RAYMOND F. LEDERER,
Defendant-Appellant

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed by counsel for the defendant-appellant, Raymond F. Lederer,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by Maureen Mintzer,
Operations Manager

Office-Supreme Court, U.S.
FILED
MAY 12 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 82-1183, 82-1187, 82-1199, 82-1240, and 82-1255

In the Supreme Court of the United States

OCTOBER TERM, 1982

RAYMOND F. LEDERER, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN M. MURPHY, PETITIONER

v.

UNITED STATES OF AMERICA

FRANK THOMPSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

HOWARD L. CRIDEN, PETITIONER

v.

UNITED STATES OF AMERICA

MICHAEL O. MYERS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

CAROLYN L. GAINES
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Department of Justice
Washington, D.C. 20530
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QUESTIONS PRESENTED

1. Whether the government must have probable cause to suspect a member of Congress of a crime, or of a predisposition to commit a crime, before it conducts an investigation of him and videotapes his meetings with undercover agents.

2. Whether the Due Process Clause barred petitioners' convictions for offenses relating to bribery because the unlawful payments were offered by undercover government investigators, because a government informant allegedly urged certain petitioners to be as explicit as possible in stating what they would do in return for the illegal payments, or because the informant allegedly engaged in misconduct that did not prejudice petitioners.

3. Whether the government improperly concealed exculpatory evidence, so that certain petitioners' convictions should be reversed.

4. Whether a ready response to an undercover agent's offer of an illegal payment can be sufficient to establish predisposition, and thereby defeat petitioner Lederer's entrapment defense.

5. Whether petitioner Murphy's conviction should be reversed because of error in the supplemental instruction given to the jury.

6. Whether the district court gave too unfavorable an instruction on petitioner Thompson's credibility as a witness at his own trial.

7. Whether evidence of a meeting between petitioner Myers and undercover agents, occurring after the illegal payment was made to petitioner Myers, was improperly admitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1183

RAYMOND F. LEDERER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 82-1187

JOHN M. MURPHY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 82-1199

FRANK THOMPSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

No. 82-1240

HOWARD L. CRIDEN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 82-1255

MICHAEL O. MYERS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-83a)[1] is reported at 692 F.2d 823. The opinion of the district court (Pet. App. 84a-249a) is reported at 527 F. Supp. 1206. The opinion of the court of appeals on an interlocutory appeal by petitioner Myers (Pet. App. 250a-272a) is reported at 635 F.2d 932. The opinion of the court of appeals on an interlocutory appeal by petitioners Murphy and Thompson (Pet. App. 273a-282a) is reported at 642 F.2d 699.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 1982. The petitions for rehearing were denied on November 17, 1982. The petitions for a writ of certiorari in Nos. 82-1183, 82-1187 and 82-1199 were filed on January 14, 1983; the petitions in Nos. 82-1240 and 82-1255 were filed on January 17, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2).

STATEMENT

Petitioners were convicted, in three jury trials in the United States District Court for the Eastern District of New York, of offenses arising out of what is known as the Abscam investigation.

1. In the course of this investigation, Melvin Weinberg, an FBI informant, acted as the representative of a fictitious organization supposedly backed by two wealthy Arab sheiks seeking to invest their money in the United States. Petitioner Errichetti, the mayor of Camden, New Jersey, and a New Jersey state senator, contacted Weinberg in connection with investments in casinos then being built in Atlantic City, New Jersey. The district court found that "Errichetti claimed to have extraordinary influence in obtaining gambling casino licenses, power over the commissioners who issued the licenses, connections with organized crime, ability to deal in narcotics, guns and counterfeit

[1] "Pet. App." references are to the appendix to the petition in No. 82-1199.

securities, as well as intimate knowledge of which members of the New Jersey legislature could be [bo]ught." Pet. App. 93a-94a.

At one meeting Errichetti, Weinberg, FBI undercover agent Amoroso, who was also posing as a representative of the sheiks, and petitioner Criden, an attorney brought to the undercover agents by Errichetti, discussed problems that might arise if a revolution occurred in the sheiks' country and they wanted to seek asylum in the United States.[2] As the district court found, "[i]mmediately after this conversation Errichetti and Criden formed an alliance in which they undertook to produce for Amoroso and Weinberg public officials who, in return for money, were willing to use their influence with the government on the sheiks' behalf." Pet. App. 95a.

Specifically, Criden told his law partners, petitioner Johanson and Ellis Cook (who testified for the government under a grant of immunity), that if they arranged meetings between Congressmen and the sheiks or their representatives, $100,000 would be paid to each Congressman and shared with the person who arranged the meeting. Johanson then contacted petitioner Myers, who was a member of the House of Representatives. Myers and Errichetti met with Weinberg and Amoroso in a hotel room; the FBI recorded the meeting on videotape. Pet. App. 16a-17a.[3] The court of appeals described the meeting as follows (*id.* at 17a):

> Early in the conversation, Myers boasted of his influence in Congress. When Amoroso mentioned his [earlier] conversation * * * with Errichetti concerning the sheiks' possible immigration problems, Myers replied, "Absolutely. Where I could be of help in this type of matter, first of all, is private bills that

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[2] Errichetti and Criden travelled to Florida for this meeting. Pet. App. 94a-95a.

[3] This meeting was held at Kennedy Airport, in the Eastern District of New York. Petitioners travelled from New Jersey and Pennsylvania to attend. Pet. App. 17a.

> can be introduced." Myers explained that delay was important in immigration matters and said, "[I]f I wanta keep somebody in the country, all I do is introduce a private bill." Later in the conversation, Amoroso told Myers that his employer was planning major investments in the United States, possibly including something in Philadelphia. Myers agreed with Amoroso that such an investment in his district would give him "a little protection," and added that it would provide a reason to go "full force and, ah, not that I won't otherwise," and the "perfect opportunity to raise hell before Congress." At the end of the meeting Amoroso handed Myers an envelope containing $50,000 in $100 bills. Amoroso said, "Spend it well"; Myers replied, "Pleasure."

The money in the envelope was divided among Myers (who received $15,000), Errichetti (who received $15,000), Criden, Johanson, and Cook. At a subsequent meeting among Myers, Criden, and two other undercover agents who were posing as representatives of the sheiks, Myers complained about the small size of his payment. *Id.* at 18a.

Myers, Errichetti, Criden, and Johanson were each indicted on three counts: conspiracy to defraud the United States and to violate 18 U.S.C. 201, which prohibits bribery of public officials, in violation of 18 U.S.C. 371; bribery and aiding and abetting bribery, in violation of 18 U.S.C. 201 and 2; and travelling in interstate commerce to carry on the unlawful activity of bribery, in violation of 18 U.S.C. 1952.[4] They were tried together,

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[4] Petitioner Myers unsuccessfully moved to dismiss the indictment, then appealed the denial of that motion. The court of appeals rejected, on the merits, his claims: that 18 U.S.C. 201 violates the Speech or Debate Clause of the Constitution, Article I, Section 6, Clause 2 (Pet. App. 258a, citing *United States* v. *Brewster*, 408 U.S. 501 (1972), and *United States* v. *Johnson*, 383 U.S. 169 (1966)); that his indictment was invalid because it alleged an agreement to perform a legislative act in return for a bribe (Pet. App. 259a, citing *United States* v. *Brewster*, *supra*); that Congress, acting under its Article I, Section 5, Clause 2 power to "punish its

and Myers, the only one of the four to testify, explained that he was only "playacting"; that is, "Myers * * * claimed that Weinberg had told Errichetti, and Errichetti had told Myers, that nothing would ever have to be done for the sheiks in connection with immigration. According to Myers, Errichetti told him just prior to the [first] meeting what he should say to impress the sheik's representatives. Myers claimed that he did not intend to fulfill any of the promises he made at the meeting." Pet. App. 19a. Over the government's objection, the district court instructed the jury that it should convict only if it found that Myers was not "playacting." *Ibid.* All of the defendants were convicted on all counts.[5]

2. Petitioner Lederer, another member of Congress, was also contacted by Johanson. According to Cook's testimony, Johanson said that he had explained the sheiks' feared immigration problems to Lederer and had told Lederer that the sheiks' representatives insisted that the Congressman accept the money personally, presumably in order to ensure that he would be obligated to the sheiks. Lederer and Errichetti met in a hotel room at Kennedy Airport with Weinberg and Amoroso; this meeting was also recorded on videotape. Pet. App. 19a. The

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Members for disorderly Behavior," has exclusive jurisdiction to punish bribery (Pet. App. 260a, citing *United States* v. *Brewster*, *supra*, and *Burton* v. *United States*, 202 U.S. 344, 367 (1906)); that Section 201 should not be interpreted to permit prosecutions growing out of undercover investigations like Abscam (Pet. App. 262a-267a); that Section 201 did not reach Myers' alleged conduct because the subject of the legislative act he promised to take was fictitious (*id.* at 267a-268a, citing *United States* v. *Brewster*, *supra*, 408 U.S. at 526-527); and that some level of suspicion, such as probable cause, should have been required before he was investigated (Pet. App. 269a-270a). This Court denied certiorari. 449 U.S. 956 (1980).

[5] Errichetti and Criden were each sentenced to concurrent terms of six years' imprisonment and fines totalling $40,000. Myers and Johanson were each sentenced to concurrent terms of three years' imprisonment and fines totalling $20,000. Pet. App. 9a.

court of appeals described this meeting as follows (*id.* at 19a-20a):

> Lederer said that Errichetti had briefed him on the sheik's immigration problems. When Amoroso said, "I understand that you can introduce legislation," Lederer replied, "Right, a bill. Private bill. Sure." Lederer then raised a concern that people might ask, "Why all at once does a Philadelphia Congressman want to help somebody . . .?" * * * At the end of the meeting, Amoroso handed Lederer a bag containing $50,000 in $100 bills, commenting, "I hope you don't mind a brown paper bag with this in" and adding, "I hope you spend it well."

Criden distributed this money, giving Cook an envelope containing $5,000 marked "RL" (for petitioner Lederer), and telling Cook that Errichetti had taken $20,000 and Criden and Johanson $15,500. Johanson subsequently passed the $5,000 to Lederer. Approximately five months later, FBI agents interviewed Lederer about the meeting; Lederer denied that Errichetti was present, denied that private immigration bills had been discussed, and denied that he had received a package or a brown paper bag. Pet. App. 20a.

Lederer, Errichetti, Johanson, and Criden were each indicted on four counts. Three paralleled the counts of the Myers indictment; the fourth charged that Lederer, aided and abetted by the others, received an illegal gratuity in violation of 18 U.S.C. 201(g). Errichetti, Johanson, and Criden were severed after they were convicted in the Myers prosecution. At trial, Lederer acknowledged that he had received $5,000 of the $50,000 handed him by Amoroso. His only defense was that he had been entrapped. He was convicted on all counts and sentenced to three years' imprisonment and fines totalling $20,000. Pet. App. 9a-10a.

3. Petitioner Thompson, then a Representative from New Jersey, was introduced to Criden by Joseph Silvestri, a New Jersey businessman, after Criden asked Silvestri

about Congressmen who would be willing to meet with the sheiks' representatives. Criden told Weinberg that Thompson had agreed to cooperate and would meet with Weinberg and Amoroso. At approximately the same time, Criden also explained to Cook, his law partner, that arrangements had been made so that Thompson would not have to accept the money personally. Thompson, Criden, Weinberg, and Amoroso held a videotaped meeting on October 9, 1979, to discuss private immigration bills and their usefulness in delaying deportation. When Amoroso mentioned money, Thompson insisted that he was not interested in receiving money but continued to give assurances that he would do whatever he could to help the sheiks. The meeting ended with no money having been exchanged. Pet. App. 21a.

Later in the same day, Criden alone returned for another meeting with Weinberg and Amoroso. The court of appeals described this videotaped meeting (Pet. App. 21a-22a):

> Criden complained that at the morning session Amoroso had altered their agreement, which, he claimed, called for no mention of money and Criden simply receiving a package. Weinberg and Amoroso denied making such an arrangement, stating that they were willing to have Criden take the package as long as Thompson acknowledged the money. Criden demurred, arguing that Thompson was too experienced and suspicious and could not be expected to act like Myers and Lederer. Criden agreed to talk with Thompson and telephoned to arrange a meeting with the Congressman.

In the evening of that same day, Thompson and Criden met again with Amoroso. Criden said "Frank [Thompson] understands the situation." Amoroso replied, "There's the briefcase" and pointed to a briefcase containing $50,000 in cash. Thompson then said to Criden either "You look after that for me will you?" or "You look at that for me will you?"; the tape is indistinct. Pet. App. 22a; see *id.*

at 2a. The discussion turned to investments, and Thompson said that investments by the sheik in his district "would put him in a position to justify his support of the sheik." *Id.* at 22a. At another point, Amoroso, recalling the morning conversation, said that they had then been "shadow boxing," to which Thompson replied, "Well, you have to be careful." *Ibid.* At the end of the meeting, both Thompson and Criden momentarily lifted the briefcase, and Criden carried it away. Criden subsequently reported to Cook that Thompson had taken $20,000 of the money. *Ibid.*

During the meeting on the evening of October 9, Thompson said he might send his "pal," petitioner Murphy, a Congressman from New York, to meet with the sheiks' representatives. Pet. App. 22a. Thompson then met with Murphy and arranged for him to meet Criden, and on October 20, 1979, Murphy and Criden met Weinberg and Amoroso at a videotaped meeting,[6] which the court of appeals described as follows (*id.* at 23a):

> The discussion centered on the sheik's anticipated immigration problems. Amoroso said that his employers felt it was worth "whatever they have to put out" to obtain assistance. Amoroso explained that his employer had said, "[T]ake the money, go find the people that can, can do this for me." Criden replied, "All you have to do is get a hold of me. I will get a hold of Jack [Murphy]." Later, Weinberg said, commenting on the apparent absence of any problem, "As long as the man says he's going to take care of it. That's what counts." Murphy answered, "Yeah." Weinberg then made clear that it would be a "different deal" if any help was needed for anyone other than the two employers that had been mentioned. "[I]n other words," Amoroso explained, "these, what we're, what we're coming up front with, the money for is just for these two guys." Murphy answered,

[6] This meeting was also held at Kennedy Airport, and the money was taken to New Jersey and Pennsylvania to be distributed. Pet. App. 23a-24a.

> "Yeah." At the end of the meeting Amoroso picked up a briefcase containing $50,000 in $100 bills. Criden said, "Why don't you give that to Jack." Murphy said, "Howard [Criden] why don't you take care of that."

The court of appeals also stated that the jury could have concluded that Murphy said "Howard why don't you take care of that for me?" *Id.* at 23a n.6.

Criden later told Cook that Thompson was to be given $25,000 of this money, of which $15,000 was Murphy's share; Thompson telephoned Criden and arranged a meeting, and after the meeting Criden told Cook he had delivered the money to Thompson. When questioned by FBI agents about his meetings with Weinberg and Amoroso, Thompson denied that immigration matters had been discussed and denied that anyone had received a briefcase. Pet. App. 24a, 25a.[7]

Subsequently, Amoroso took Murphy aside at another videotaped meeting described by the court of appeals (Pet. App. 25a):

> In this conversation Murphy acknowledged the dangers of speaking about money * * *. Murphy told Amoroso, "[A]ny time money's mentioned where a public official is mentioned, there—there's automatically an ability to link 'em to something illegal or to taking a consideration for something, uh, that he's supposed to do or use his office to do and there's, no public official would ever be involved in anything like

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[7] Subsequent events involving Representative John Murtha of Pennsylvania, who received no money and was not indicted, are also relevant to the Thompson and Murphy prosecutions. Thompson gave Murtha's name to Criden and suggested that Murtha was a candidate to meet with the sheiks' representatives. Murtha testified at trial that Thompson had told him, in conversations on the House floor, "that there would be $50,000 in 'walking around money' for Congressmen willing to help" wealthy Arabs who might need assistance on immigration matters. Thompson also told Murtha that he had enlisted Murphy in the enterprise. Pet. App. 24a.

> that . . . Particularly Thompson, myself, or Murtha.[8] We'd never do anything like that. See?" Amoroso said, "[Y]ou're being coy with me." Murphy said, "Sure." Then when Amoroso said he had been reluctant to give Murphy money, Murphy said, "You didn't, you didn't give me any money. . . . I never, received any money from anyone." The conversation continued with the two discussing future plans for Murphy to meet the sheik.

Thompson and Murphy were indicted (together with Criden and Silvestri, who were subsequently severed) on five counts—bribery, conspiracy, and interstate travel charges paralleling those of the Myers indictment; an unlawful conflict of interest, consisting of the receipt of money "as compensation for services to be rendered before departments, agencies and officers of the executive branch of the Government" in an immigration matter involving foreign nationals, in violation of 18 U.S.C. 203(a); and receipt of an unlawful gratuity, in violation of 18 U.S.C. 201(g). Pet. App. 10a-11a.[9] The basis of the substantive charges against Thompson was his receipt of money exchanged at the October 20 meeting; the October 9 meeting was used as evidence of the conspiracy.

Thompson testified in his own behalf and denied receiving any money. Pet App. 25a. Murphy neither testified nor called any witnesses; his defense, argued in summation, was that he had not received any money. *Id.* at 25a-26a. The interstate travel count was dismissed by the district court. Thompson was convicted of conspiracy, bribery, and receipt of an unlawful gratuity; he was acquitted of unlawful conflict of interest. Murphy was convicted of conspiracy, conflict of interest, and receipt of

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[8] See page 9 note 7, *supra*.

[9] Petitioners Thompson and Murphy took an interlocutory appeal from the denial of their motion to dismiss the indictment. The court of appeals affirmed (Pet. App. 273a-282a), holding that their claims were controlled by its holdings on petitioner Myers' interlocutory appeal. See pages 4-5 note 4, *supra*.

an unlawful gratuity; he was acquitted of bribery. Pet. App. 11a.[10]

4. After the trial and before sentencing, the district court conducted a 16-day hearing to consider claims by all seven petitioners that their convictions should be overturned and the indictments dismissed because of various forms of government misconduct and errors at the trial. The court permitted petitioners to rely on evidence developed in other trials that grew out of the Abscam investigation. The district court denied relief, writing a comprehensive opinion. Pet. App. 84a-249a. Petitioners appealed from their convictions, and the court of appeals, also writing a comprehensive opinion, unanimously affirmed all the convictions except for petitioner Murphy's conviction of unlawful conflict of interest, which it reversed and remanded for a new trial. *Id.* at 5a-83a.

ARGUMENT

Most of the petitioners raise, in some form, two contentions applicable to the Abscam investigation generally —that it should not have been conducted without probable cause to believe that the members of Congress to whom payments were offered were guilty of, or predisposed to commit, related offenses; and that the level of government involvement violated the Due Process Clause. These contentions are without foundation in the law. Petitioners also "voice a chorus of indignation" concerning informant Weinberg (Pet. App. 50a), but they fail to show that any of their claims about Weinberg entitle them to relief. Finally, petitioners make a variety of contentions bearing on their particular cases, many of which are

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[10] Murphy was sentenced to concurrent terms of three years' imprisonment and fines totalling $20,000. Pet. App. 11a. The effect of the court of appeals' reversal of his conviction on the conflict of interest charge (see page 11, *infra*) was to reduce his aggregate fine by $10,000. Pet. App. 83a n.37. Thompson was tentatively sentenced to the maximum terms, as required by 18 U.S.C. 4205(c) to permit further evaluation of his medical condition. Pet. App. 11a.

plainly insubstantial and all of which are of insufficient importance to warrant this Court's review.

1. Several petitioners, and amicus curiae American Civil Liberties Union, contend that the government should not be permitted to investigate members of Congress unless the government already has probable cause to believe that they have committed or are predisposed to commit the offense under investigation. See 82-1183 Pet. 9-14; 82-1199 Pet. 20-44; 82-1255 Pet. 24-27, 49-56; ACLU Am. Br. 6-7. See also 82-1240 Pet. 20-21.

We note at the outset that the government did not engage in random investigations of petitioners; each of the petitioners either approached the undercover agents of his own accord or was introduced as a person willing to engage in corrupt activities by another person who had shown his willingness to do so. See Pet. App. 27a n.7, 149a-150a. More important, however, petitioners do not suggest, and cannot suggest, that the decisions of this Court or the language of the Constitution requires that the government have any level of suspicion—much less probable cause—before undertaking an investigation of the kind at issue here. Whether petitioners' proposed restrictions on criminal investigations are desirable as a matter of policy is a question that belongs to the domain of legislation, not constitutional adjudication.

Probable cause is required only for a search or a seizure, and the videotaped investigation of petitioners did not constitute a search or a seizure. *Hoffa* v. *United States*, 385 U.S. 293 (1966), and *United States* v. *White*, 401 U.S. 745 (1971), establish that one party to a conversation may record it without invading any constitutionally protected interest of the other parties, and petitioners identify nothing in the logic of *Hoffa* or *White* suggesting that a different result should obtain when audio recording is supplemented by video recording—which can only result in a more accurate record of the events at issue. See, *e.g.*, *United States* v. *White*, *supra*, 401 U.S. at 751-753 (plurality opinion) ("If the conduct and revelations

of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking * * *. [W]e are not prepared to hold that a defendant who has no constitutional right to exclude the informer's unaided testimony nevertheless has a Fourth Amendment privilege against a more accurate version of the events in question.").[11]

Similarly, except for one insubstantial contention by petitioner Lederer,[12] petitioners do not assert that they

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[11] Petitioner Thompson asserts (82-1199 Pet. 35-36) that in *White* the government had probable cause to believe that the defendant would engage in criminal conduct during the recorded conversation. But the Court in *White* never referred to the existence of probable cause, and the clear holding of that case is that probable cause is unnecessary.

[12] Petitioner Lederer asserts (82-1183 Pet. 22-23) that the Speech or Debate Clause precluded the government from introducing into evidence a financial disclosure statement he had filed as required by House rules. As the court of appeals explained, however (Pet. App. 58a), this statement was in no sense a contribution to a legislative debate or to any other form of legislative activity; it plainly does not fit within this Court's definition of legislative acts. See page 14, *infra*. Petitioner Lederer's only argument to the contrary is that because establishing rules like that requiring the disclosure statement "is the constitutional prerogative of the House, anything done in that regard, including the filing of reports, is shielded by the Speech or Debate Clause." 82-1183 Pet. 23. This is a non sequitur; nothing in the Constitution suggests that everything done pursuant to the internal rules of the House is "Speech or Debate." "In no case has this Court ever treated the Clause as protecting all conduct *relating* to the legislative process. * * * The Speech or Debate Clause does not prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions" (*United States* v. *Brewster*, 408 U.S. 501, 515, 528 (1972) (emphasis in original)). Nor does that Clause protect all actions performed by members of Congress "in their official capacity" (*Gravel* v. *United States*, 408 U.S. 606, 625 (1972)).

Indeed, petitioner Lederer concedes (82-1183 Pet. 23) that he could be punished for filing a false disclosure statement; this would

are being prosecuted for activities that fall within the ambit of the Speech or Debate Clause. That Clause protects only "legislative acts," and as the Court has specifically stated (*Gravel* v. *United States*, 408 U.S. 606, 625 (1972)):

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

It is entirely clear that petitioners' dealings with the undercover agents were not legislative acts; they were, at most, contacts with possible constituents, and the Court has explicitly rejected the suggestion that " 'errands' performed for constituents [or] the making of appointments with Government agencies" are legislative acts. *United States* v. *Brewster*, 408 U.S. 501, 512 (1972). In light of these settled principles, petitioners do not seriously contend that the acts for which they were prosecuted are themselves protected by the Speech or Debate Clause.

Instead, petitioners appear to assert that although the Abscam investigation and prosecution violated no identifiable constitutional provision, the combination of videotaping and the fact that some of the targets were members of Congress somehow made the investigation offen-

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not be so if such statements truly fell within the Speech or Debate Clause. We note that it is well established that members of Congress can be prosecuted for making false statements to agencies of the House of Representatives. See, *e.g.*, *United States* v. *Bramblett*, 348 U.S. 503 (1955) (false statements to House Disbursing Office); *United States* v. *Diggs*, 613 F.2d 988 (D.C. Cir. 1979), cert. denied, 446 U.S. 982 (1980) (false statements to House Office of Finance).

sive to constitutional values.[13] Petitioners cite no case supporting this contention, however. The only argument they advance is that any other result would create an unacceptable danger that the executive branch will harass or intimidate members of Congress for political reasons. See 82-1183 Pet. 12-13; 82-1199 Pet. 22-23; 82-1255 Pet. 25, 52-53.

We do not dispute that politically motivated investigations are improper. But petitioners do not point to, and no court has found, the slightest evidence that the investigation of petitioners was politically motivated. As the court of appeals stated, the suggestion that "the Government targeted the defendant Congressman for political or other impermissible reasons * * * is flatly contradicted by the evidence. The Government had no role whatever in the selection of any of the four Congressmen involved [here] * * *. Criden and Johanson selected Congressmen

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[13] Petitioner Murphy makes a somewhat related argument that purports to rest on the First Amendment but is in fact a challenge to the sufficiency of the evidence against him. 82-1187 Pet. 13-18. Petitioner Murphy does not contend that the act of which the jury found him guilty—"directly or indirectly ask[ing], demand[ing], exact[ing], solicit[ing], seek[ing], accept[ing], or receiv[ing], or agree[ing] to receive anything of value for himself for or because of any official act performed or to be performed by him" (18 U.S.C. 201(g))—is protected by the First Amendment. Instead, he claims that his guilt was "inferred from constitutionally protected activity" (81-1187 Pet. 14; see *id.* at 15, 16 n.15). But it is entirely permissible, and indeed commonplace, to use constitutionally protected speech as *evidence* of an element—usually a mental element—of an offense. To give an obvious example, expressions of personal animosity toward another are ordinarily protected by the First Amendment, but they can of course be used as evidence that the speaker intended to harm the person of whom he spoke.

Petitioner Murphy's First Amendment claim in fact dissolves into a contention that there was insufficient evidence of his guilt. See 82-1187 Pet. 15, 17-18. But there was abundant evidence of Murphy's guilt: for example, the references to money at the meeting, which the jury could view on videotape; the secretive way in which the payment was made, which the jury again saw; the evidence that Murphy had been briefed; and his "coy" videotaped discussion with Amoroso about the virtues of being discreet.

Myers and Lederer. Silvestri selected Congressm[a]n Thompson. Thompson selected Congressman Murphy." Pet. App. 27a n.7. Petitioners also do not explain why the danger of politically motivated investigations requires that *all* prosecutions of members of Congress resulting from investigations initiated without probable cause be barred; in any other case involving a claim that a prosecutorial decision was motivated by an impermissible purpose (see, *e.g.*, *United States* v. *Goodwin*, No. 80-2195 (June 18, 1982); *Oyler* v. *Boles*, 368 U.S. 448 (1962)), the courts would determine in a particular case, relying on rebuttable presumptions if appropriate, whether the action was improperly motivated. Moreover, videotaping would seem to reduce the threat of politically motivated investigations, by eliminating so far as possible the danger that an investigator will misunderstand or distort a target's responses.

In any event, if politically motivated *investigations* violate the Constitution, barring a *prosecution* is an irrational remedy for the violation. On petitioners' own hypothesis, the danger is that the executive branch will conduct such an investigation not in order to institute a criminal prosecution through lawful means, but in order to collect information of lawful but embarrassing acts or statements by members of Congress. Prohibiting a prosecution would, therefore, be unlikely to deter an investigation of the kind petitioners fear; such an investigation could still purport to be concerned with others associated with the member of Congress, or with civil wrongs. Indeed, the principal effect of petitioners' approach would be to benefit those members of Congress whom the executive branch in fact had legitimate reason to investigate and who were in fact willing to engage in criminal conduct.[14] See also *United States* v. *Brewster*,

[14] As the court of appeals pointed out when it considered Myers' interlocutory appeal (Pet. App. 263a): "Any Member of Congress approached by agents conducting a bribery sting operation can simply say 'No.' Each Member's capacity to reject bribe opportunities could be regarded as sufficient safeguard against the risk that

supra, 408 U.S. at 524-525 ("[F]inancial abuses by way of bribes, perhaps even more than Executive power, would gravely undermine legislative integrity and defeat the right of the public to honest representation.").

In our view, there was nothing repugnant to constitutional values in the conduct of the Abscam investigation. The government did not tape meetings between members of Congress and their families or their close personal or political associates; it taped meetings that the targets believed to be of a purely business character between members of Congress and strangers who were seeking special treatment and who had made no secret of their willingness to spend large amounts of money to obtain it. The values of a democratic society will not be disserved if members of Congress are put on notice that, if the other parties to the meeting so desire, the members' conduct at such meetings may some day be reported, in the most accurate possible form, to the public.

2. Only petitioner Lederer claimed at trial that he was entrapped. Pet. App. 28a.[15] But several petitioners contend that the conduct of the investigation was so outrageous that their convictions must be reversed. See 82-1183 Pet. 15-19; 82-1189 Pet. 45-57; 82-1240 Pet. 13-21; 82-1255 Pet. 31-49. This contention relies on the suggestion made by some of the Justices in *Hampton* v. *United States*, 425 U.S. 484 (1976), that even if a defendant is not entrapped, government involvement in a

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the Executive Branch would successfully use these tactics for political reprisal." The court of appeals further noted (*id.* at 263a-264a) that there is no reason to doubt Congress's ability to recognize any dangers of politically motivated investigations and to take appropriate legislative action. "Once the Supreme Court decided in *Brewster* that the Constitution does not prevent Congress from applying the criminal law enforcement process to a Member's acceptance of a bribe in return for a promise of legislative action, the way was cleared for that process to function without any special constitutional restraints arising from the status of the defendant." *Ibid.*

[15] We discuss the arguments raised by petitioner Lederer in connection with his entrapment defense at pages 26-28, *infra*.

crime may reach such a level that the Due Process Clause may bar a conviction. Petitioners' principal argument in support of this contention is that the government "created" the crimes for which they were convicted rather than "detecting" independently-existing criminal conduct. See, *e.g.*, 82-1199 Pet. 19, 50; 82-1255 Pet. 34, 39-47. Petitioners also assert that the allegedly unsavory background and conduct of FBI informant Weinberg somehow caused the investigation to violate due process (*e.g.*, 82-1240 Pet. 13-21; 82-1255 Pet. 32) and that the inducements they were offered were too large (*e.g.*, 82-1255 Pet. 32, 36-37).

a. It is well settled that the government does not violate the Due Process Clause merely by providing a predisposed defendant with the means and the opportunity to commit a crime. See *Hampton* v. *United States*, *supra*; *United States* v. *Russell*, 411 U.S. 423, 435-436 (1973); *Sherman* v. *United States*, 356 U.S. 369, 372 (1958); *Sorrells* v. *United States*, 287 U.S. 435, 441 (1932). As the court of appeals explained, that is all the government did here (Pet. App. 32a; footnote omitted):

> Though the "sting" was surely elaborate, its essential characteristic was the creation of an opportunity for the commission of crime by those willing to do so. The Government produced people with fictitious identities ready to pay bribes to Congressmen. Word of the availability of bribe money was made known. From that point on, the essential conduct of the agents and their paid informant was to see who showed up to take the bribes and videotape them in the act of doing so. Whatever may be the due process limit of governmental participation in crime, it was not reached here.

The essence of due process is "fundamental fairness" (*Hampton* v. *United States*, *supra*, 425 U.S. at 492 (Powell, J., concurring)), and there is no discernible sense in which the government's role in this investigation resulted in petitioners' being treated unfairly. The investigation did no more than replicate circumstances in which a public offiical might find himself; there was no

possibility that the investigation would incriminate a public official who was not susceptible to accepting illegal payments. As the district court remarked "each [petitioner] was a willing volunteer seeking illegal and corrupt payments." Pet. App. 152a. Nor was this a case in which it might be said that the defendants were no more than minor actors in a government-operated criminal enterprise (cf. *United States* v. *Twigg*, 588 F.2d 373 (3d Cir. 1978)); petitioners were central figures whose refusal to engage in illegal conduct would have caused this aspect of the Abscam operation to collapse.[16]

Moreover, whatever the importance to society of exposing persons to various temptations to engage in other kinds of unlawful activity (cf. *Hampton*, 425 U.S. at 498 (Brennan, J., dissenting); *United States* v. *Twigg*, *supra*), there is a clear and important interest in exposing public officials who will accept bribes. It is surely reasonable to assume that officials will on occasion be offered illegal payments of the kind involved in this case (cf. *Hampton*, 425 U.S. at 496 n.1 (Brennan, J., dissenting) ("a reasonable * * * inquiry might be whether the accused would have obtained the contraband from a source other than the Government"); the crafty behavior of petitioners Thompson and Murphy indeed appears to be evidence that such schemes are not uncommon. At the same time, it is exceedingly difficult to discover a bribery-related offense except through undercover investigation of some form, because all of those with knowledge of the offense have a strong interest in concealing it. See Pet. App. 263a.[17] In addition, as we have noted, petitioners were not selected at random; they came to the undercover

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[16] *United States* v. *Jannotti*, 673 F.2d 578, 608-609 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982)—an Abscam case—makes untenable any suggestion of a conflict between *Twigg* and the instant decision of the court of appeals.

[17] Congress itself recognized this point in its report on an investigation into alleged efforts by representatives of the Republic of Korea to buy influence. See H.R. Rep. No. 95-1817, 95th Cong., 2d Sess. 93-94 (1978).

agents through contacts that are presumably very similar to those that would be developed if an actual wealthy potential immigrant were seeking to buy influence. And as both courts below noted (Pet. App. 262a n.7, 161a-162a), petitioners' culpable acts were videotaped from start to finish so that they could be brought before the jury in the most complete and accurate fashion possible, not subject to the interpretations of the undercover agents or to contests over credibility. In these circumstances, there is no basis for concluding that the investigation transgressed the Due Process Clause.[18]

b. Petitioners Myers, Errichetti, Johanson, and Criden also argue that the government violated the Due Process Clause in its use of informant Weinberg. See 82-1255 Pet. 31-49; 82-1240 Pet. 13-21. (Petitioner Criden makes a similar argument about petitioner Errichetti. 82-1240

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[18] The court of appeals also disposed correctly of petitioners' suggestion that the inducements were so great that they violated due process. As it noted, these contentions appear to refer not to the $50,000 bribes, but to the large investments the sheiks proposed to make; and as the court explained (Pet. App. 33a):

> We have considerable difficulty with the premise of this argument, which is that a Congressman is privileged to take a $50,000 bribe so long as he simultaneously believes he is bringing the benefits of investments to his district. * * * [Moreover,] the facts of these cases belie the fanciful image of four Congressmen so anxious to bring investment benefits to their districts that they reluctantly accept bribes on which they thought the investments were conditioned. Quite to the contrary, the evidence shows four Congressmen jumping at the chance to take a bribe and discussing investments in their districts as a convenient cover to justify their rendering of purchased legislative services. As Thompson said, anticipating possible criticism for helping the sheik, "I'm in a position to say well of course I'm helping this guy. Why shouldn't I help this guy . . . his money is helping my guys work everyday." Myers put it more bluntly: an investment in the district "gives me a little protection."

In addition, the district court specifically found, in the cases of Errichetti and Criden, "no evidence to connect their motivations for these crimes with their hoped-for bonanzas if the casino project went ahead." Pet. App. 153a.

Pet. 15.) But while petitioners detail Weinberg's alleged misdeeds at some length, they fail to show—and often do not even attempt to show—that these actions amounted to a violation of petitioners' rights.[19]

For the most part, the thrust of petitioners' argument seems to be that the Due Process Clause was violated by the mere "use of a personage such as Weinberg at all to 'sting' United States Congressmen" (82-1255 Pet. 32). Even accepting petitioners' allegations about Weinberg's character and conduct, it is well established that the government must sometimes use informants with such a background; indeed, as the district court explained (Pet. App. 179a), often the authorities use an informant precisely because they hope that a careful and sophisticated criminal, who would sense (or learn, upon investigating) the inauthenticity of an undercover law enforcement officer, might regard the informant as a genuine fellow criminal. For this reason, it is not enough for petitioners to assert that Weinberg was paid by the FBI,[20] or that Weinberg frequently acted in ways characteristic of a criminal.

Nor are petitioners entitled to immunity from prosecution on the basis of their assertions that Weinberg's supervision was inadequate. See, *e.g.*, 82-1255 Pet. 32. The district court specifically found that "the supervision imposed on Weinberg was more than adequate to the circumstances of this investigation." Pet. App. 164a. Even apart from this finding, petitioners attempt to make a serious showing of prejudice in connection with only one series of actions by Weinberg—his so-called "coaching" of petitioner Myers. This "coaching" consisted, according to petitioners, of telling Myers two things: that he should

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[19] See Pet. App. 198-199a ("Throughout these trials, defense counsel sought to make Weinberg's character and activities the key issue before the juries, thus distracting from the conduct and motivations of the defendants. These issues were unsuccessful 'red herrings' at the trials, and they are 'red herrings' still.").

[20] We note that Weinberg was not paid on a contingent fee basis. Pet. App. 51a.

be vigorous in insisting to the sheiks' representatives that he had the power to help the sheiks and would use it; and that he need not actually fulfill his promise. Petitioners also urge that similar "coaching" of Senator Harrison Williams, a defendant in another Abscam prosecution whose case is not before this Court, is also relevant.

i. The first alleged element of the "coaching" consisted simply in urging the suspects to make their representations of what they were willing to do in return for cash as explicit as possible. In many ways, this made the investigation more, not less, fair to the suspects. Indeed, petitioner Murphy criticizes the government for not taking steps to obtain more unequivocal evidence of his guilt. 82-1187 Pet. 18-22.[21] A public official who was unsure about the reason he was being offered money, or who was reluctant to sell his influence, would, when told that he should boast about his power in order to obtain a payment, surely should have demurred and refused to par-

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[21] Petitioner Murphy's argument on this point is essentially that "[g]iven the simple purpose of the October 20 meeting * * * and the agents' complete control over the events," any ambiguities in the videotaped dealings should be strictly interpreted against the government's version of the events. 82-1187 Pet. 20. But as the court of appeals pointed out (Pet. App. 46a), "[u]ndercover agents offering bribes to Congressmen are entitled to simulate the guarded conversation that would be expected of those proposing an unlawful venture. * * * They need not say, 'Congressman, I have here a cash bribe to be exchanged for your corrupt promise to be influenced in your official action.'" See also Pet. App. 246a-247a n.17 (during another Abscam investigation, petitioner Errichetti criticized an undercover agent for being insufficiently subtle in offering a bribe to an official). This is precisely the kind of issue one would have expected petitioner Murphy to raise forcefully before the jury, and there is no reason to second-guess the jury's resolution of it.

In any event, the government did not have "complete control" of the events; it videotaped them, but government agents were only some of the parties to the conversations. We also note that after Thompson insisted that the sheik's representatives be more subtle, it was surely reasonable for the agents to believe that Thompson's "pal," Murphy, who was brought to them by Thompson, would want to operate under a similar arrangement.

ticipate further in the scheme. As the court of appeals concluded (Pet. App. 44a):

> Suggesting how easy it is to commit a crime hardly establishes a due process violation. The "coaching," if it occurred, barely qualifies as any inducement at all; if the script was supplied, no one was coerced into playing his part. Due process challenges to an undercover agent's encouragement have been rejected when one defendant was solicited twenty times before committing an offense, *United States* v. *Esquer-Gamez*, 550 F.2d 1231 (9th Cir. 1977), and when another defendant was tempted by a million-dollar cash deal and prodded by veiled threats, *United States* v. *Reynoso-Ulloa*, 548 F.2d 1329 (9th Cir. 1977), cert. denied, 436 U.S. 926 (1978). Whatever conduct might transgress the [Due Process Clause], * * * the facts of the Abscam investigation are not even close to the line. * * * [T]he record reveals that these Congressmen were not children of Hamelin, seduced by the piping of Melvin Weinberg.

ii. As the court of appeals also explained, it is far from clear that the other alleged form of "coaching"—telling petitioner Myers that he need not fulfill the promise he would make in return for the $50,000—was practiced in this case. See Pet. App. 34a-38a. But even assuming that it was, petitioners fail to show how such "coaching" could violate the Due Process Clause. Surely it did not place pressure on Myers to commit the offense; while it may have made the corrupt agreement more attractive to Myers because it suggested that he would not have to uphold his part of the bargain, that is scarcely the kind of inducement that might raise a question under the Due Process Clause. Indeed, the proposal that Myers take the sheik's money and then not fulfill his promise added an element of fraud beyond a simple exchange of influence for cash and should have been at least equally repulsive to an honest official.

Although petitioner Myers now contends only that the coaching violated the Due Process Clause, and does not

contend that it draws into question his guilt under the bribery statute, 18 U.S.C. 201(e), we note that the court of appeals considered and rejected the latter contention. First, as the court explained, the district judge accepted, for purposes of the trial, the contention that it would be a defense to a charge of bribery to show that the official who accepted the money had no intention of carrying out the agreement (Pet. App. 34a-35a):

> Judge Pratt * * * afforded the defendants in the *Myers* case wide latitude to present evidence in support of their claim. He then submitted the claim to the jury, under an instruction that the jury was not to convict unless the Government proved beyond a reasonable doubt that a Congressman who had accepted money in return for a promise to introduce immigration bills had done so with the intention of carrying out that promise. * * * The *Myers* jury obviously rejected the defense, and, on the evidence before them, they were certainly entitled to do so. * * * An entirely plausible inference even from the defendants' evidence, and the one the jury apparently accepted, is that Weinberg was not urging the Congressmen to utter promises they were reluctant to make and did not intend to keep, but was simply anxious to make sure that they fully and unambiguously expressed on videotape the promises they were all too ready to make and fully intended to keep.
>
> Moreover, after the trials were concluded, Judge Pratt afforded the defendants a full opportunity at the "due process" hearing to amplify the record to persuade him, as the trier of fact on the due process claim, that only a charade had occurred. After conducting a wide-ranging hearing, the District Judge found the claim unsupported as a factual matter, and his findings are not clearly erroneous.

In addition, the court of appeals concluded, after examining the language and legislative history of 18 U.S.C. 201(c), that "[w]ith respect to the bribery statute, * * * the defense of fraud is * * * unavailable. If Myers was 'playacting' and giving false promises of assistance to

people he believed were offering him money to influence his official actions, he violated the bribery statute." Pet. App. 42a-43a. We can think of no reason that Congress might have had for immunizing public officials who accept what would be a bribe but who know that they are defrauding the bribe-payer as well as the public. See also *United States* v. *Hood*, 343 U.S. 148, 151 (1952) (in construing a statute related to Section 201(c), "[w]hether the corrupt transaction would or could ever be performed is immaterial. We find no basis for allowing a breach of warranty to be a defense to corruption").

3. Petitioners Thompson and Criden claim that the prosecution improperly concealed exculpatory evidence. See 82-1240 Pet. 21-25; 82-1199 Pet. 62-65. Petitioner Criden's allegations concern only informant Weinberg; he claims that the jury was denied the opportunity "to evaluate not just Weinberg's sordid past, but the full extent of his venality during the investigation" (82-1240 Pet. 25). The district court (Pet. App. 93-98) and the court of appeals (*id.* at 52a-53a) considered these claims in detail and rejected them, showing that the petitioners were not deprived of any material information bearing on Weinberg's credibility. In addition, as both courts below noted, petitioners had ample opportunity to impeach Weinberg's credibility (*id.* at 52a, quoting *id.* at 230a-231a):

> Weinberg admitted that he had been a criminal most of his life, that he had made his living by being a con man, that he had lied and cheated and violated the law from his early teenage years, that he was a convicted felon, that he had made a deal with the government to cooperate in return for probation on his felony conviction in Pittsburgh, and that he had received substantial compensation for his cooperation in the Abscam investigation and trials.

Moreover, as the district judge, who presided at the trials, explained, these cases simply did not turn on Weinberg's credibility. Pet. App. 229a. To the extent the defendants raised serious factual issues at all, those issues concerned the interpretation of allegedly ambiguous acts and

statements made by petitioners. The jury was able to resolve these ambiguities by themselves viewing the acts and listening to the statements, which the government had recorded, and petitioners fail to show how the additional evidence that they assert the government should have uncovered and revealed would have helped them persuade the jury on the questions that were central to the case. Petitioner Criden's principal argument, for example, appears to be only that the additional evidence would have persuaded the jury "to reject Weinberg's denial that he orchestrated a charade in the *Myers* case" (82-1240 Pet. 22); but as we have explained, demonstrating the existence of a "charade" would not have been a defense.

Petitioner Thompson's claim (82-1199 Pet. 62-63) is that the government improperly concealed the "immunity" granted to Congressman Murtha, who testified against him (see page 9 note 7, *supra*). But not only was no immunity granted to Congressman Murtha; the question whether the likelihood of his being prosecuted would affect his credibility was fully aired at trial. The parties stipulated at trial that the government had "no present intention of prosecuting Congressman Murtha" (Tr. 2783),[22] and that stipulation was read to the jury. Petitioner Thompson's counsel stated that that stipulation was "fully acceptable on behalf of Mr. Thompson" (*ibid.*). The district judge, when he instructed the jury, reminded them of this stipulation and warned that Congressman Murtha's testimony should be considered "carefully" (Tr. 3081).

4. Petitioner Lederer, the only one of the petitioners who requested an entrapment instruction, appears to claim (82-1183 Pet. 19-22) that the government introduced insufficient evidence of his predisposition to commit the offenses charged. As the district court and the court of appeals explained, Lederer's prompt response to the offer of a bribe—his "ready complaisance" as Judge

[22] We rely on the brief filed by the United States Attorney in the court of appeals for citations to the transcript.

Learned Hand termed it (*United States* v. *Becker*, 62 F.2d 1007, 1008 (2d Cir. 1933), quoted at Pet. App. 207a)—was ample evidence of predisposition:

> In seeking only $5,000 for himself out of the $50,000 he received, Lederer displayed neither the greed of Myers nor the guile of Thompson and Murphy; nevertheless, the evidence at his trial fully entitled the jury to find his predisposition beyond a reasonable doubt. Predisposition may be established by "the accused's ready response to the inducement." The videotape of the September 11 meeting reveals Lederer responding with alacrity. As he assured the sheik's representatives, "I'm not a Boy Scout."

Pet. App. 29a-30a; citations omitted. See *id.* at 207a-208a.

Petitioner Lederer appears to urge (82-1183 Pet. 20-21) that only past evidence of criminal activity and not just an eager response to a government offer can possibly establish predisposition, but he fails to cite anything in an opinion of this Court, or in logic, that supports such a rule. Nor, contrary to the heading in his petition (*id.* at 19), does he cite any decision of a lower federal court that has embraced such a rule; on the contrary, courts have consistently rejected it. See, *e.g.*, *United States* v. *Jannotti*, 673 F.2d 578, 604 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982) (citing cases).

Petitioner Lederer also urges (82-1183 Pet. 24-25) that this Court resolve what he describes as a conflict among the credits on the question whether a defendant must admit the acts charged, in order to have an entrapment defense submitted to the jury. Specifically, petitioner Lederer suggests that he wished to claim both that he was entrapped and that he was receiving only a legal campaign contribution. But the jury in Lederer's case was given an entrapment instruction (Pet. App. 107a); and Lederer never attempted or offered to testify at trial that he was receiving only a campaign contribution (*id.* at 50a & n.20). Nothing in the district court's opinion, the court of appeals' opinion, or the law of the Second

Circuit [23] suggests that Lederer would have been barred from offering both defenses if he had sought to do so; and having not sought to do so at trial, he certainly cannot now invoke a supposed conflict among the circuits on an issue not implicated in his case.

5. Petitioners assert that the courts below committed a number of other errors, but in no instance do they show why these claims raise issues requiring this Court's review. For example, petitioner Murphy's principal contention (82-1187 Pet. 5-13) is that a supplemental instruction given by the district court in response to the jury's written question was incorrect. Since this was not even a standard instruction but one devised by the district court in an effort to clarify the particular matter about which the jury inquired, it is clear that there is no need for this Court to review the court of appeals' decision that the district court did not err.

In any event, petitioner Murphy's highly attenuated argument on this point is insubstantial. The district judge initially instructed the jury: " 'It is for you to determine based on all of the evidence whether the Government has established beyond a reasonable doubt that the money in the briefcase transferred from Amoroso to Criden on October 20 [the date of the meeting among Amoroso, Weinberg, Criden, and Murphy] was for the benefit of and *eventually received* by defendant Murphy or defendant Thompson or both.' " Pet. App. 62a (emphasis added by the court of appeals) This instruction was given in connection with the bribery charge, but the district court told the jury that it applied to the "re-

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[23] The Second Circuit has permitted a defendant raising an entrapment defense to assert his innocence on other grounds, so long as he "did not take the stand to deny personally his participation in the transaction and did not affirmatively introduce any other evidence that he was not involved." *United States* v. *Valencia*, 645 F.2d 1158, 1172 (2d Cir. 1980). See also *United States* v. *Mayo*, No. 82-1256 (2d Cir. Apr. 8, 1983), slip op. 2976; *United States* v. *Williams*, No. 82-1111 (2d Cir. Apr. 5, 1983), slip op. 2841-2842 n.5.

ceipt" element of the unlawful gratuity and conflict of interest counts as well. *Ibid.* Petitioner Murphy does not object to this instruction. 82-1187 Pet. 7.

During its deliberations, the jury sent the following inquiry to the judge:

> Some members of the jury feel it is possible that defendant Murphy took "direction & control" of the briefcase however momentarily by instructing Criden to take physical possession, making Criden the "executor" of the money in a sense at that point.
>
> May we construe this to be in satisfaction of element one of Count 2 in lieu of "*eventually*[*"*] receiving the money at some later time?

Pet. App. 63a-64a (emphasis by the jury). After an extended discussion with counsel, the district judge responded to the question. His supplemental instruction, reproduced at 82-1187 Pet. App. 97a-99a, began by reminding the jury that the central question was whether Murphy received the money. The district judge then noted that the jury emphasized "eventually," and said that he interpreted the question to be asking whether the receipt *must* have been "eventually, and not then, October 20th," at the meeting. *Id.* at 98a.

The judge answered this question by saying:

> [M]y answer to you is that in applying this element to the defendant Murphy, you may disregard the term eventually. It is for you to evaluate what was said, what happened, what all the circumstances were, and determine from that whether the defendant Murphy received the money.

82-1187 Pet. App. 98a. The district judge immediately added that "[i]t is absolutely critical * * * that he would have to know that it was money that was in the briefcase. * * * [C]ertainly if you should find that he did not know that there was money in that briefcase while that was going on, then unquestionably you should find him not guilty on all the substantive charges." *Ibid.* The district judge then summed up: "If you are talking simply about

the temporal aspect of this, the timing now as opposed to eventually, the answer is yes. You may construe those circumstances to be receipt of this money on or shortly after October 20, 1979" (*id.* at 98a-99a). After the jury resumed its deliberations, Murphy's counsel made the single objection that the judge may have left it unclear at one point that the government had the burden of proof; the district court immediately recalled the jury and clarified that point. *Id.* at 99a-101a.

The jury's inquiry referred specifically to count two, charging bribery, on which petitioner Murphy was acquitted. His counsel never requested the district judge to clarify the relationship between the supplemental instruction and the other counts. See Pet. App. 66a n.24.

Moreover, petitioner Murphy does not point to a single sentence of the instruction that misstated the law. It appears that petitioner Murphy would have interpreted the question differently, to be asking about the relationship that had to exist between Criden and Murphy in order to find that Murphy received the money on October 20.[24] Also, petitioner Murphy in retrospect (although he did not so indicate at the time) apparently would not have reemphasized the point that he was not guilty if he did not know the briefcase contained money, although that was a central contention of his defense (see Pet. App. 65a, 67a; 82-1187 Pet. App. 88a). But at least so long as the district judge did not misstate the law, these were plainly matters to be confided to his discretion, subject to the review of the court of appeals. That court found that "Judge Pratt's handling of the episode was admirable under the circumstances." Pet. App. 68a.

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[24] On this point the court of appeals noted (Pet. App. 67a-68a): Counsel had ample opportunity after hearing both the substance of Judge Pratt's proposed response and the delivery of the response to suggest additional language explicating constructive possession. If the jury's approximation of the concept evident from the text of their inquiry required refinement, the opportunity for amplification was available to the defendants both before and after the instruction was given.

b. Petitioner Thompson contends (82-1199 Pet. 58-61) that the district court, although acting in accordance with established Second Circuit precedent, gave too harsh an instruction on his credibility as a witness. Even petitioner Thompson's own account shows that the judge's statement that Thompson, because he was a defendant, had a motive to testify falsely, was immediately balanced by the statement that " 'it by no means follows that he's not capable of telling the truthful, straightforward story' " (*id.* at 59). In addition, the district judge pointed out that the jury should "consider that [a defendant] takes a real risk by taking the stand and subjecting himself to cross-examination" (Tr. 3055).[25] See *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973) (invoking "the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge").

The cases cited by petitioner Thompson, far from supporting him, show the incorrectness of his contention. In *Hicks* v. *United States*, 150 U.S. 442, 452 (1893), the Court strongly suggested that an instruction pointing out that a defendant who testified had a motive to lie would *not* be sufficient to warrant the reversal of a conviction. In *Reagan* v. *United States*, 157 U.S. 301 (1895), the Court upheld an instruction that drew the defendant's credibility into question at least as sharply as the district court's charge in this case; immediately after the passage quoted by petitioner Thompson (82-1199 Pet. 60-61), the Court stated (157 U.S. at 310-311):

> On the other hand, the court may, and sometimes ought, to remind the jury that interest creates a motive for false testimony; that the greater the interest the stronger is the temptation, and that the interest of the defendant in the result of the trial is of a character possessed by no other witness, and is therefore a matter which may seriously affect the credence that shall be given to his testimony. * * * [T]he

[25] See page 26 note 22, *supra*.

> court may charge the jury that the peculiar and deep interest which the defendant has in the result of the trial is a matter affecting his credibility, and to be carefully considered by them.

In *Taylor* v. *United States*, 390 F.2d 278, 284-285 (8th Cir. 1968), the court carefully distinguished between its holding—that the judge could charge a jury that the defendant had a peculiar interest in testifying falsely—and its suggestion that trial judges might wish to avoid such a charge. *United States* v. *Saletko*, 452 F.2d 193, 197-198 (7th Cir. 1971), cert. denied, 405 U.S. 1040 (1972), followed *Taylor* in both respects.

c. Finally, petitioners Myers, Errichetti, and Johanson challenge (82-1255 Pet. 56-64) the district court's admission of evidence of the videotaped meeting among Myers, Criden, and two FBI undercover agents posing as the sheik's representatives, at which Myers complained about the small size of his share of the $50,000 handed to him at the earlier meeting. Petitioners contend that this evidence should not have been admitted because that meeting occurred after the meeting at which the money was passed and the criminal transaction consummated. But it is entirely clear that Myers' subsequent remarks were relevant, because they "illuminat[ed] the nature of the conspiracy" (Pet. App. 56a) between the sheik's representatives and petitioners. Indeed, as the court of appeals noted (Pet. App. 56a), these conversations were in fact part of the conspiracy charged in the indictment (although the district court, in an excess of caution, instructed the jury otherwise) and were therefore fully admissible on that ground. Moreover, it is far from clear that evidence of an inculpatory *statement* like Myers'—that constitutes only an admission or an explanation of a prior act—is evidence of "other crimes, wrongs, or acts" within the meaning of Fed. R. Evid. 404(b). In any event, that rule, on its face, permits evidence of "other crimes, wrongs, or acts" to be admitted for such purposes as "proof of motive, * * * intent, * * * plan [or] knowl-

edge"; the rule does not distinguish between acts committed prior to the alleged crime and subsequent acts.

Petitioners urge that *United States* v. *Boyd*, 595 F.2d 120 (3d Cir. 1978), stands for the proposition that evidence of subsequent acts may not be used. But the panel in *Boyd* narrowly limited its ruling. It suggested that the subsequent acts evidence was being used only to show bad character; it specifically distinguished several cases that permitted evidence of subsequent acts to be admitted; and it explicitly stated that its holding was not inconsistent with *United States* v. *Laurelli*, 293 F.2d 830 (3d Cir. 1961), cert. denied, 368 U.S. 961 (1962). In *Laurelli*, the court of appeals upheld the admission of evidence of an offer of a bribe that occurred after the bribe attempt for which the defendant was indicted, on the ground that it "tended to show * * * intent" (*id.* at 832). The court also noted that "[w]e have held in a number of cases that evidence of similar acts subsequent to the one being tried is admissible" (*ibid.*). Indeed, Judge Hunter concurred in *Boyd* on the explicit understanding that the court had not held that evidence of subsequent crimes was generally inadmissible. See 595 F.2d at 126-127.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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